

Dated: July 18, 2022



Daniel P. Collins
Daniel P. Collins, Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

| | | |
|------------------------------------|---|------------------------------|
| In re: |) | Chapter 11 Proceedings |
| |) | |
| POTENTIAL DYNAMIX LLC, |) | Case No.: 2:11-bk-28944-DPC |
| |) | |
| Debtor. |) | Adversary No.: 2:13-ap-00799 |
| <hr/> |) | |
| TIMOTHY H. SHAFFER, Chapter |) | |
| 11 Trustee, |) | |
| |) | |
| Plaintiff, |) | UNDER |
| |) | ADVISEMENT ORDER |
| v. |) | |
| |) | [NOT FOR PUBLICATION] |
| AMAZON SERVICES, LLC, |) | |
| |) | |
| Defendant. |) | |
| <hr/> |) | |

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1 **I. SUMMARY OF LAWSUIT AND COURT FINDINGS**

2 This Adversary Proceeding¹ involves a nine count Complaint² brought by Timothy
3 H. Shaffer, Trustee of the Chapter 11 Debtor, Potential Dynamix, LLC against Amazon
4 Services, LLC on July 9, 2013. Over the course of this Adversary Proceeding, Plaintiff's
5 claims have been boiled down to claims for (1) breach of contract, (2) turnover of property
6 to Plaintiff, and (3) a claim for a violation of the bankruptcy automatic stay.

7 Plaintiff alleges Debtor placed roughly 6.4 million units of product in Amazon's
8 hands for sale on Amazon's online platform but was only paid by Amazon for
9 approximately 5.9 million units. Plaintiff contends (and Defendant does not disagree) that
10 the average retail price of these products was \$22 per unit from which Debtor was paid
11 \$16.31 per unit and Amazon received \$5.69 per unit. The heart of the parties' disputes
12 concern Amazon's accounting related to the inventory the Debtor placed with Amazon
13 over the course of their eight-year relationship. Plaintiff contends Amazon has the burden
14 of demonstrating where all its inventory went, and that Plaintiff is entitled to recover
15 \$16.31 for every unaccounted unit placed in Amazon's hands. Plaintiff seeks breach of
16 contract and turnover damages of \$2,869,663 plus interest at 12% per annum from the
17 midpoint of their relationship. Amazon contends Plaintiff carries the burden of proving all
18 matters pertinent to the claimed breach of contract and Plaintiff's damages and that
19 Plaintiff failed to do so. The Court resolves the burden of proof issues in favor of
20 Defendant.

21 Plaintiff's final claim is for damages Debtor sustained when Amazon violated the
22 bankruptcy automatic stay³ by terminating Debtor's access to Amazon's online sales
23 platform on April 11, 2013. Years ago, this Court found that Amazon's actions willfully
24 violated the automatic stay. Plaintiff seeks stay violation damages of \$732,000 plus
25 interest from the date of judgment.

26
27

¹ Defined terms in this Order are summarized in Attachment 1.

28 ² DE 1. "DE" means docket entry in Adversary No. 2:13-ap-00799-DPC ("Adversary Proceeding").

³ 11 U.S.C. § 362(a).

1 Following years of discovery and motion practice, these matters finally came to
2 trial in 2021. The trial was conducted virtually on the Court's ZoomForGovernment
3 platform.⁴ Once the four-day trial concluded, the parties briefed certain issues. The Court
4 held oral argument on those briefs. The Court issued a tentative ruling and invited the
5 parties' critiques. On February 24, 2022, the Court heard oral argument on the parties'
6 critiques. After oral arguments, the Court took this matter under advisement.

7 After reviewing the contracts between the parties, the vast amount of Amazon's
8 inventory control data, the expert reports and other exhibits⁵ submitted at trial and after
9 hearing and/or reading the testimony of numerous witnesses as well as considering the
10 parties' pleadings and 122-page Joint Pretrial Statement,⁶ this Court finds that Amazon is
11 liable to Plaintiff in the amount of \$668,484 on account of damages it caused to Debtor
12 when it violated the stay by terminating Debtor's access to Amazon's online platform.
13 The Court also finds Amazon breached its Contract with Debtor by failing to pay or
14 turnover to Debtor 20,405 units of product which were placed in Amazon's hands by
15 Debtor but, as of March 31, 2015, had never been returned to Debtor or paid for by
16 Amazon. Nothing produced to this Court indicates these units were unsellable. Debtor
17 should have been able to realize \$16.31/unit from the sales of these units. Amazon
18 breached its Contract with Debtor with respect to the 20,405 units and is liable to Debtor
19 for the sum of \$332,806.⁷ Judgment shall be awarded against Amazon and in Plaintiff's
20 favor on these claims in the aggregate amount of \$1,001,290. Attorney's fees will not be
21 awarded to either party as neither sought fees in connection with this Adversary
22 Proceeding. Debtor's stay violation damages were unliquidated so this Court will not
23 award prejudgment interest on the stay violation damages but Debtor's breach of contract
24
25

26 ⁴ Counsel for both sides (and their staff) masterfully conducted this virtual trial at about the time COVID infections
27 were reaching their 2021 post-holiday peak.

28 ⁵ Attachment 2 is the list of Exhibits admitted at trial.

⁶ DE 332.

⁷ 20,405 x \$16.31/unit.

1 damages were liquidated as of April 1, 2015, so interest shall accrue on the breach of
2 Contract damages of \$332,806 at 12%⁸ per annum from April 1, 2015, until paid.⁹

3 4 **II. INTRODUCTION**

5 Debtor was formed in 2006 in a basement in Springfield, Missouri by Bellino and
6 Schmidt.¹⁰ Later that same year, the company moved to Phoenix, Arizona. Bellino and
7 Schmidt were each 50% members of the Debtor.¹¹ The business is sometimes referred to
8 as “DAB.”¹²

9 The Debtor primarily sold health and personal care items and did so exclusively
10 online via amazon.com through two programs offered by Amazon: (1) Amazon’s
11 Merchant Fulfilled Network and (2) Amazon’s Fulfillment by Amazon Program¹³ The
12 relationship between the parties was governed by the Merchants@Amazon.com Program
13 Agreement and the Amazon Services Business Solutions Agreement.¹⁴ The FBA Program
14 was governed by of the ABSA which is referred to as the FBA Agreement.¹⁵ The FBA
15 Agreement incorporates applicable “Program Policies.”¹⁶ Included in these “Program
16 Policies” are the “Inventory Adjustment” codes which were identified in the Seller Central
17 “Help Page.”¹⁷

18 Through the Merchant Program, the Debtor offered items for sale on amazon.com
19 but shipped the items itself and handled their own customer service.¹⁸ Through the FBA

20 ⁸ Under the parties’ contract, Washington law governs the contract. Washington’s statutory judgment rate is 12% per
21 annum.

22 ⁹ This Order constitutes the Court’s findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of
23 Bankruptcy Procedure.

24 ¹⁰ Admin DE 219, pg. 4; Admin DE 80, pg. 1. “Admin DE” references a docket entry in the Debtor’s administrative
25 bankruptcy proceeding, 2:11-bk-28944-DPC.

26 ¹¹ Admin DE 219, pg. 4. Even though the company moved to Phoenix, Arizona, it was organized under the laws of
27 Nevada.

28 ¹² The initials of Bellino.

¹³ Admin DE 219, pg. 4. *See also* DE 332, pg. 14, ¶ 6.

¹⁴ DE 332, pg. 17, ¶ 24. Exhibit 1.

¹⁵ DE 332, pg. 18, ¶ 2.

¹⁶ Trial Ex. 1 at Bates page No. 1.0001.

¹⁷ These Adjustment Codes are found at Trial Ex. 2. These Adjustment Codes were revised by Amazon’s Bachand
in 2018, well after the Amazon-Debtor relationship terminated. The Court will not consider these 2018 revisions.
The 2018 revisions are found at Trial Ex. 261.

¹⁸ DE 332, pg. 14, ¶ 7.

1 Program, Debtor shipped inventory to Amazon and offered that inventory for sale on
2 amazon.com and paid Amazon to receive, pick, pack, ship, and provide customer service
3 for the Debtor's products.¹⁹

4 Debtor started its relationship with Amazon in 2008 using the Amazon Merchant
5 Program. In 2010, the Debtor switched from the Amazon Merchant Program to the FBA
6 Program.²⁰ Debtor was unprepared for the problems that would follow with respect to
7 Debtor's internal systems and the new cost structures that came with the FBA Program.
8 As a reseller of health and personal care products, Debtor sold 31,166 distinct products.²¹
9 It is the Court's understanding that Debtor was one of Amazon's biggest customers in
10 terms of number of products listed for sale on amazon.com.²²

11 Amazon assigned a unique number to each product. These numbers are known as
12 "Amazon Standard Identification Number"²³ Each product also had its own "Stock-
13 Keeping Units" barcode. Because other customers of Amazon also sold some of these
14 exact same products (same ASIN, same SKU), Amazon mixed some of Debtor's inventory
15 with inventory owned by third parties. This "comingling" was approved by the Debtor
16 and became a part of the process for fulfilling customer orders.²⁴ Since Amazon has
17 fulfillment centers (warehouses) all over the world, if a customer of Debtor ordered a
18 particular product, that sale might be fulfilled not by sending the customer a unit shipped
19 by Debtor to Amazon at fulfillment center A, but rather, by a unit shipped to Amazon by
20 a third party to fulfillment center B, which was closer to the customer's desired delivery
21 point.

22
23 ¹⁹ DE 332, pg. 15, ¶ 8.

24 ²⁰ Admin DE 219, pg. 5. This Disclosure Statement incorrectly notes Debtor moved from an Amazon fulfillment to
a Merchant fulfillment. It was just the opposite, but the implications were the same: chaos ensued. See Reilly's
deposition testimony described below.

25 ²¹ DE 332, pg. 18, ¶ 1.

26 ²² See DE 396, pg. 65.

27 ²³ DE 332, pg. 18, ¶ 1.

28 ²⁴ "Comingling" is a "virtual" concept in that it refers to Amazon fulfilling a customer's order with the most readily
available product regardless of whether that product was shipped to Amazon by the Seller from which the customer
bought the product. See DE 397, pg. 27-8. Physical comingling may also occur, but the Court understands that, in
Debtor's relationship with Amazon, comingling is more a "virtual" concept.

Over the course of their eight-year relationship,²⁵ the Debtor placed 6,316,429 product units into Amazon's hands, 5,978,113 of which were sold. 63,445 of the sold units were the subject of refunds/sale reversals requested by the customer. Through January 31, 2014, 344,906 units were "Removed," i.e., either destroyed by Amazon at Debtor's request²⁶ or shipped back to Debtor at Debtor's request. Debtor's expert, Morones, noted that Debtor's inventory was reduced by an additional 17,524 units through "Adjustments."²⁷ This series of events led Debtor's damages expert to set the following table in her Damages Report:²⁸

| | | |
|-----|---------------------------|----------------------------|
| (1) | Expected Ending Inventory | |
| | <u>Transaction</u> | <u>Units</u> |
| | Receipts | 6,316,429 |
| | Sales | (5,978,113) |
| | Customer Returns | 63,445 |
| | Removals | (344,906) |
| | <u>Adjustments</u> | <u>(17,524)</u> |
| | Expected Ending Inventory | 39,331 Units ²⁹ |

These inventory related facts are uncontested. What is contested is Morones' damages amounts referred to in her Report as (2) Reimbursable Adjustments, (3) Unpaid Refund Reimbursements, and (4) Sales Proceeds not remitted to Debtor. Amazon also challenges Trustee's claim for prejudgment interest.

Amazon was paid \$128,224,650 from the sale of Debtor's units and, in turn, paid Debtor \$95,048,175 after taking its storage and handling fees of \$33,176,475. Overall, the average sales price was \$22 per unit of which the Debtor was paid \$16.31 per unit and Amazon kept \$5.69 per unit. These facts are uncontested.

The complexity of this case centers around the massive volume of data pertaining to these units and whether the many, many coded transactions can be relied upon as

²⁵ On October 22, 2013, Amazon finally terminated this relationship. See Ex. 144.

²⁶ A unit might be destroyed, for example, if it was a consumable product whose useful life had expired.

²⁷ Amazon contends that, by May 2015, the number of units reduced through "Adjustments" were 16,567. See DE 397, pg. 29 and Trial Ex. 5, ¶ 33, Table 2.

²⁸ Ex. 7.

²⁹ As of January 13, 2014. After that date, an additional 19,890 units were Removed. See § V(D) below for further discussion on this point.

1 accurately describing what happened to those units. For example, did Debtor ship fully
2 sellable units to Amazon? Did Amazon accurately input those units into Amazon's
3 electronic system? How many units were lost, stolen, damaged, expired, etc. while in
4 Amazon's possession? If a customer was refunded their purchase price did Amazon
5 receive that unit back from the customer? Did Amazon pay Debtor the full amount due
6 to the Debtor? . . . and on and on.

7 As the parties' relationship carried on, Amazon produced inventory, sales and
8 payment data and posted it for Debtor to review on an electronic platform known as Seller
9 Central. The information disseminated on Seller Central is referred to as the Seller Central
10 Data. Within the body of Seller Central Data is a subset of information focused upon sales
11 transactions. This is referred to as the Settlement Data.³⁰ While Amazon had a duty to
12 provide data to Debtor contemporaneous with the event affecting Debtor's inventory,³¹
13 Amazon did not preserve all this data, nor did it apparently have the ongoing contractual
14 obligation to do so. For its part, Debtor apparently never challenged the Seller Central
15 Data³² although Azzarelli testified that, prior to the Petition Date, Debtor did ask Amazon
16 questions about Debtor's perception that its inventory in Amazon's hands was reported to
17 be lower than Debtor thought it should be.³³

18 As various events came to affect a given product unit, Amazon would enter a code
19 applicable to the subject transaction or event. For example, a Code M indicates the unit
20 is misplaced, Code D means the unit was destroyed and Code F notes the unit was found.
21 Attached to this Order as Attachment 3 are two trial exhibits³⁴ reflecting the Amazon
22

23 ³⁰ See DE 396, p. 61, ll. 4-13. See also Ashworth Deposition at 43:13-24.

24 ³¹ Williams' Testimony at trial.

25 ³² Plaintiff has not suggested that Amazon has committed evidence spoliation, but Plaintiff's lawyers were obviously
26 displeased in this Adversary Proceeding that Amazon did not (could not?) produce a complete Seller Central Data
27 set from the outset of the parties' business relationship. During the discovery phase of this Adversary Proceeding,
28 Amazon did produce the M15 Data in May 2015, but the M15 Data does not include Settlement Data. By the time
this Adversary Proceeding was filed the Seller Central Data, according to Amazon employee Bachand, did not
include a full or accurate set of the Settlement Data. The Court does not find, nor does the Trustee suggest, that the
Debtor's or Trustee's challenges to Amazon's inventory control or sales data was time barred.

³³ Azzarelli Deposition at page 81.

³⁴ Trial Exs. 2 and 147.

1 “Inventory Adjustment” codes and a description of the meaning of those codes.³⁵ One
2 Inventory Adjustment code in particular was heavily used by Amazon, Code Q. Code Q
3 signaled “Damaged – Miscellaneous.” Amazon assigned this code to reflect “a decrease
4 of [Debtor’s] sellable inventory when damage cannot be attributable to a source.”³⁶ Yet
5 the Inventory Adjustment codes in effect through 2013 (when the parties’ relationship
6 terminated) do not reflect that Amazon disclaimed responsibility for Code Q units. At
7 trial, Amazon did not take responsibility for Code Q units. 166,279 units were given a
8 Code Q designation.³⁷ Much of the debate between the parties relates to Code Q units,
9 especially the 147,968 sellable Code Q units.³⁸ Some Inventory Adjustment codes called
10 for Debtor to bear the loss or cost or impact of a code designation to that unit. Other
11 Inventory Adjustment codes called for Amazon to reimburse Debtor for the unit.
12 Amazon’s Reimbursement to Debtor could be effectuated by paying the Debtor or adding
13 that exact same kind of unit³⁹ to Debtor’s inventory.

14 During the course of the discovery phase of this Adversary Proceeding, Amazon
15 created a May 2015 transaction data report which came to be known as the M15 Data.⁴⁰
16 The M15 Data is contained in gigantic Excel spreadsheets but is incomprehensible to all
17 but the deepest data divers. To make matters more interesting, the M15 Data, while
18 identified by Amazon as “the most complete information known to be available to account
19 for Debtor’s units in the Fulfillment by Amazon Program,”⁴¹ nevertheless does not contain
20 all the data pertaining to all of Debtor’s inventory nor does the M15 Data perfectly match
21 the Seller Central Data.⁴² In particular, the M15 Data does not contain any unit sales data.

22 ³⁵ Morones Declaration, page 10, ¶ 26.

23 ³⁶ See Attachment 3.

24 ³⁷ At \$16.31 per unit this is a matter of \$2,413,470.

25 ³⁸ Exs. 131 (the M15 Data) and 161 (the Settlement Data).

26 ³⁹ Same ASIN and/or SKU.

27 ⁴⁰ Ex. 5, PDF page 8 of 87.

28 ⁴¹ Ex. 5 (Williams’ Report), PDF page 8 of 87, ll. 1-4, citing at n.4, Amazon’s Amended Responses to Trustee’s Third Set of Discovery Requests, dated September 20, 2016, at 6. This document can be found at Trial Ex. 118 at Bates No. 118.0036. This document is defined as “Amazon’s September 20, 2016 Discovery Response.” See also Ex. 7 (Morones’ Damages Report), page 5 of 267, ¶ 9.

⁴² Amazon’s September 20, 2016 Discovery Response. This document makes clear that the M15 Data tracks the movement of “units.” It does not purport to deal with sales or payments. The Debtor and Trustee knew or should have known sales information was contained in the Settlement Data.

1 That information is referred to as the Settlement Data. The Settlement Data is a subset of
2 the Seller Central Data. Plaintiff and Defendant hired experts to make sense of the colossal
3 volume of inventory data with an eye towards establishing (or refuting) Plaintiff's breach
4 of contract damages (and, therefore, turnover damages) caused by Amazon, if any.

5 6 **III. JURISDICTION**

7 The parties stipulated to this Court's jurisdiction to enter final orders adjudicating
8 and disposing of all core and non-core claims contained in the Trustee's Complaint.⁴³
9 Additionally, this Court finds it has jurisdiction over this Adversary Proceeding pursuant
10 to 28 U.S.C. § 1334 and 157(B)(2).

11 12 **IV. POTENTIAL DYNAMIX'S BANKRUPTCY**

13 Disagreements between Debtor's owners, Bellino and Schmidt, arose along the
14 way. This resulted in Schmidt filing a lawsuit in Arizona Superior Court, Maricopa County
15 against the Debtor, Bellino, and Tara Bellino.⁴⁴

16 After borrowing on its line of credit until it was 100% utilized and with sales
17 plummeting and the Bellino versus Schmidt fight brewing, the Debtor quickly ran out of
18 money. Debtor filed its chapter 11 bankruptcy⁴⁵ petition on October 13, 2011.⁴⁶

19 Animosity between Bellino and Schmidt eventually made its way into this Court.⁴⁷
20 Schmidt filed a Motion to Dismiss the Bankruptcy Proceeding⁴⁸ asserting his approval
21 was not obtained prior to filing Debtor's chapter 11 bankruptcy petition, as required by
22 the Debtor's operating agreement. Schmidt claimed he did not ratify the bankruptcy
23

24 ⁴³ DE 60. See also DE 332, the Joint Pretrial Statement, Section I(c), page 16 of 122.

25 ⁴⁴ Admin DE 219, pg. 6 (case no. CV2011-014287). Bellino and Schmidt eventually settled the State Court lawsuit.
Admin DEs 183 & 197.

26 ⁴⁵ The Bankruptcy Proceeding which was filed in this District at Case No. 2:11-bk-28944.

27 ⁴⁶ Admin DE 219, pg. 5-6; Admin DE 1. This date is referred herein as the Petition Date. The Bankruptcy Proceeding
was initially assigned to Judge Charles G. Case. Upon his retirement, the case was reassigned to the undersigned on
January 18, 2013.

28 ⁴⁷ Admin DE 219, pg. 6.

⁴⁸ Admin DE 80.

1 filing.⁴⁹ In its Response, Debtor alleged Schmidt forged Bellino's signature on the
2 Debtor's operating agreement and that management rested with Bellino because he was
3 the Debtor's majority member.⁵⁰

4 The ongoing dispute between Bellino and Schmidt was disruptive in the
5 bankruptcy proceeding to the point that it caused the Official Committee of Unsecured
6 Creditors⁵¹ to request the appointment of a chapter 11 trustee to oversee the Debtor's
7 bankruptcy case.⁵² Although Bellino and Schmidt disagreed on many things, they agreed
8 that the appointment of a trustee was the best course for this Bankruptcy Proceeding.⁵³
9 The Court approved the appointment of a chapter 11 trustee pursuant to Fed.R.Bankr.P.
10 2007.1(c) and § 1104(a).⁵⁴ Subsequently, the Trustee was appointed as the Debtor's
11 chapter 11 trustee to administer the affairs of the Debtor's bankruptcy estate.⁵⁵

12 The Trustee filed a Disclosure Statement⁵⁶ and Plan⁵⁷ which provided for the
13 assumption of the Contract between Amazon and the Debtor. A hearing on approval of
14 the Disclosure Statement was held on April 29, 2013.⁵⁸ Although that hearing was
15 continued to May 28, 2013, the hearing was vacated because, on April 12, 2013, Amazon
16 unilaterally terminated the Contract, revoking the Debtor's ability to sell its products on
17 Amazon's online platform. Amazon contended the Debtor was using Amazon's platform
18 to sell "restricted items," as defined in Section 1.1 of the Contract.⁵⁹ The Trustee sought
19 the Court's intervention.⁶⁰ The Court ordered Amazon to immediately reinstate the

20 ⁴⁹ Admin DE 80.

21 ⁵⁰ Admin DE 86.

22 ⁵¹ The United States Trustee appointed the Unsecured Committee on November 9, 2011, and later amended it due to
the resignation of creditor Bias Distributors. Admin DEs 51 & 64. Prior to his judicial appointment, Paul Sala was
hired as counsel for the Unsecured Committee. Admin DEs 72 & 77.

23 ⁵² Admin DE 89.

24 ⁵³ Admin DE 102.

25 ⁵⁴ Admin DE 104.

26 ⁵⁵ Admin DE 110. The Trustee was selected by the UST.

27 ⁵⁶ Admin DE 219. Trial Ex. 222 introduced by Amazon is actually a disclosure statement filed in error at Admin.
218. The Court takes judicial notice of the correct Disclosure Statement filed at Admin DE 219. The Court also takes
judicial notice of all other pleadings filed in this Adversary Proceeding and on the administrative docket in Debtor's
Bankruptcy Proceeding to the extent those pleadings were not otherwise admitted into evidence at trial.

28 ⁵⁷ Admin DE 217.

⁵⁸ Admin. DE 265.

⁵⁹ Admin DE 243. Trustee's Trial Exhibit 144 includes a copy of the April 11, 2013, letter terminating the Contract.

⁶⁰ Admin DEs 243 and 244.

1 Contract and Debtor's access to Amazon's online platform.⁶¹ Additionally, the Court
2 found Amazon's conduct constituted a willful violation of the bankruptcy automatic
3 stay.⁶² Due to Amazon halting Debtor's access to Amazon's online platform, Debtor was
4 unable to sell its products on that platform from April 11, 2013 to April 26, 2013, a total
5 of 15 days.⁶³

6 After reinstating Debtor's access to its online platform, Amazon filed a Motion for
7 Relief from Stay seeking to terminate the Contract pursuant to § 362(d)(1).⁶⁴ Debtor, in
8 turn, filed a Motion to Assume the Contract pursuant to § 365(a).⁶⁵ The Trustee sought
9 summary judgment granting the Debtor's Motion to Assume the Contract and denying
10 Amazon's Motion for Relief from Stay.⁶⁶ Amazon sought summary judgment opposing
11 the assumption of the Contract and seeking relief from the automatic stay so it could
12 terminate the Contract.⁶⁷ The Court granted summary judgment in favor of Amazon,
13 holding the Debtor could not assume the Contract.⁶⁸ Amazon was granted stay relief to
14 send the Debtor a letter terminating the Contract pursuant to Section 10.1(y) of the
15 Contract.⁶⁹ On October 22, 2013, Amazon terminated its Contract with the Debtor.⁷⁰
16 Conceding defeat, in January 2014 the Debtor ceased operations.⁷¹

17 ⁶¹ Admin DE 262.

18 ⁶² Admin DE 262.

19 ⁶³ DE 332, pg. 16, ¶ 20.

20 ⁶⁴ Admin DE 253. The Unsecured Committee filed a Joinder in Support of Debtor's Motion to Assume the Contract.
Admin DE 276.

21 ⁶⁵ Admin DE 266.

22 ⁶⁶ Admin DE 318.

23 ⁶⁷ Admin DE 325.

24 ⁶⁸ Admin DE 364.

25 ⁶⁹ Admin DE 398. The Court's order granting summary judgment in favor of Amazon was subsequently amended to
revise the language in footnote 1, which now reads:

26 Solely for the purpose of deciding these motions for summary judgment, the Trustee, to streamline
the issues and advance the litigation process, does not dispute the facts recounted in this order.
However, the Trustee states that "if this matter proceeds to trial, [he] may present evidence to the
contrary." (Trustee's Controverting Statement of Facts, Dkt. No. 333). Accordingly, the findings
of fact and conclusions of law set forth in this decision are made for the purpose of deciding these
cross-motions for summary judgment only and, except to the extent such findings are necessary
predicates for the Court's ultimate rulings on the cross-motions for summary judgment, shall not
serve as res judicata, collateral estoppel or law of the case in other proceedings before this Court.

27 ⁷⁰ Ex. 144. Also, Trustee's Trial Exhibit 152 includes a copy of the Termination Letter.

28 ⁷¹ DE 332, pg. 17, ¶ 23. The most recent monthly operating report shows the Debtor's total cash on hand to be \$581.
Admin DE 660.

1 To this day, neither the Disclosure Statement nor the Plan have been approved or
2 rejected by the Court. Nevertheless, Debtor remains in a chapter 11 proceeding.

3 4 **V. ADVERSARY PROCEEDING PROCEDURAL HISTORY**

5 **A. The Complaint and Answer**

6 Prior to commencement of this Adversary Proceeding, Debtor alleged that Amazon
7 failed to account for a considerable amount of the Debtor's inventory.⁷² This contentious
8 issue together with Amazon's automatic stay violation drove the Trustee to file the
9 Complaint.⁷³ The Court eventually dismissed Counts 4, 5, 6, 7, 8, and 9 of the Complaint
10 (discussed further in Subsection D below).⁷⁴

11 Only counts 1, 2, and 3 remain from the Trustee's Complaint. Count 1 alleges
12 Amazon failed to turnover estate property pursuant to 11 U.S.C. § 542(a).⁷⁵ Count 2
13 alleges Amazon violated the automatic stay pursuant to 11 U.S.C. § 362. Count 3 alleges
14 Amazon breached the Contract by terminating the Contract without sending a Notice of
15 Material Default to the Debtor, by denying Debtor access to the Amazon platform, by not
16 accounting and compensating Debtor for inventory placed in Amazon's hands, by failing
17 to store, maintain, preserve, and account for Debtor's inventory and by failing to
18 compensate for that inventory.

19 Amazon filed an answer⁷⁶ that included two (2) counterclaims against the Trustee
20 and asserted the Debtor had "unclean hands" because it first breached the Contract.
21 Amazon's Answer was later amended.⁷⁷ Amazon's counterclaims allege that, to the extent
22 Amazon demonstrates any liability to Amazon by the Debtor, the Trustee, and/or the
23 Debtor's bankruptcy estate, Amazon must be allowed to setoff or recoup such liability

25 ⁷² Admin DE 243, pg. 4, ¶ 12.

26 ⁷³ DE 1.

27 ⁷⁴ DE 91 dismissed counts 4, 6, 7, 8, and 9, and DE 348 dismissed count 5.

28 ⁷⁵ Unless indicated otherwise, statutory citations refer to the U.S. Bankruptcy Code ("Bankruptcy Code"), 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

⁷⁶ DE 5.

⁷⁷ DE 35.

1 against any liability which Amazon owes to the Debtor, the Trustee, or the Debtor's
2 bankruptcy estate.⁷⁸

3
4 **B. Amazon's Counterclaims**

5 Amazon's counterclaims were withdrawn before trial.⁷⁹ Amazon's counterclaims
6 are now hereby dismissed with prejudice.

7
8 **C. Discovery Disputes**

9 Over the course of this Adversary Proceeding, the Court had occasion to address
10 numerous discovery disputes between the parties.⁸⁰ Those disputes were generally
11 resolved without motions to compel or motions for protective orders.⁸¹ No attorney's fees
12 or sanctions were awarded by the Court as a part of those discovery hearings nor did the
13 Court reserve fee or sanctions awards for disposition at the end of this Adversary
14 Proceeding.

15
16 **D. Motions for Summary Judgment**

17 Amazon moved for summary judgment on Counts 2, 3, 4, 6, 7, 8, and 9 of the
18 Complaint.⁸² The Trustee filed his Response⁸³ and Amazon filed its Reply.⁸⁴ On
19 September 16, 2015, the Court issued an order granting summary judgment in favor of
20 Amazon dismissing Counts 4, 6, 7, 8, and 9.⁸⁵ Additionally, the Court granted partial
21 summary judgment on Count 2 (stay violation) to the extent it sought punitive damages.⁸⁶

22
23 ⁷⁸ DE 5, ¶¶ 11–14.

24 ⁷⁹ DE 332 at pg. 9 and DE 397 at pgs. 5-6.

25 ⁸⁰ By this Court's count, it heard nine discovery disputes. See DEs 123, 156, 173, 182, 188, 209, 251, 335 and 358.

26 ⁸¹ The Court's procedure page and Local Rule 9013-1 require the parties meet and confer before calling the Court
27 for a resolution of discovery issues on the spot, without the filing of motions to compel or for protective orders.

28 ⁸² DE 52.

⁸³ DE 72.

⁸⁴ DE 88.

⁸⁵ DE 91. Those counts were as follows: Count 4 – Breach of Implied Covenant of Good Faith and Fair Dealing;
Count 6 – Injunction Against Further Stay Violations; Count 7 – Specific Performance; Count 8 – Negligence; and
Count 9 – Intentional Interference with Business Expectancy.

⁸⁶ DE 91.

1 On November 20, 2020, the Trustee filed his motion for summary judgment,
2 requesting the Court find that, in determining Amazon's liability, the proper cutoff date is
3 January 31, 2014 and the proper methodology requires an assessment of both "expected
4 ending inventory" and "inventory shrinkage."⁸⁷ The Trustee also requested the Court find
5 that Amazon, at minimum, is liable to pay the Debtor the replacement value of 111,688
6 units of damaged, lost, or missing inventory.⁸⁸ Amazon filed its Response.⁸⁹ The Trustee
7 filed his Reply.⁹⁰ At its February 11, 2021 hearing, the Court denied the Trustee's motion
8 for summary judgment in all respects.⁹¹ The Court specifically noted that it would not set
9 a January 31, 2014 hard stop on the calculations of damages.⁹² This is important in that
10 Amazon "Removed" 19,890 units to Debtor after January 31, 2014.⁹³

11 Amazon filed an additional motion for summary judgment seeking: (1) dismissal
12 of Count 5 of the Complaint (accounting for the inventory); (2) dismissal of Count 3
13 (breach of contract), contending the Debtor failed to provide accurate information to
14 Amazon thereby materially breaching the contract and discharging further performance
15 by Amazon; and (3) enforcement of the Contract's limitation of liability clause.⁹⁴ The
16 Trustee filed his Response⁹⁵ in opposition. Amazon filed its Reply.⁹⁶

17 The Court heard oral arguments on February 11, 2021.⁹⁷ At that hearing, the Court
18 (1) granted Amazon's request to dismiss Count 5, (2) denied Amazon's motion for
19 summary judgment as to the contention that Debtor failed to provide it accurate
20 information, and (3) took under advisement the issue pertaining to enforceability of the
21 Limitation Clause.⁹⁸ On February 15, 2021, the Court issued an under-advisement order

22 ⁸⁷ DE 266.

23 ⁸⁸ DE 266.

24 ⁸⁹ DE 306.

25 ⁹⁰ DE 321.

26 ⁹¹ DE 358.

27 ⁹² DE 358.

28 ⁹³ The report from Amazon's expert Williams contains a table reflecting unit totals through May 2015. See Trial Ex. 5, ¶ 33, table 2.

⁹⁴ DE 272.

⁹⁵ DE 303.

⁹⁶ DE 322.

⁹⁷ DE 358.

⁹⁸ DE 358.

denying Amazon's request to enforce the Limitation Clause because (1) the Limitation Clause is unclear and unreasonable, (2) at the time the Contract was executed damages were not unascertainable, and (3) enforcing the Limitation Clause would violate public policy.⁹⁹

E. Motions in Limine

The Trustee filed his Motion in Limine to Preclude the Admission of "Deep Dive" Documents into Evidence.¹⁰⁰ Amazon filed its Response.¹⁰¹ The Trustee filed his Reply.¹⁰² At the July 8, 2015, hearing, the Trustee briefly discussed the First Motion in Limine and advised it would not be argued at the hearing.¹⁰³ The hearing was then vacated, subject to call. The First Motion in Limine was never rescheduled.¹⁰⁴

On November 20, 2020, Amazon filed its Motion in Limine to Exclude Unpleaded and Untimely Claims and Damages Theories.¹⁰⁵ On the same day, Amazon filed its Motion in Limine to Exclude the Testimony of Expert Serena Morones.¹⁰⁶ The Trustee filed his Responses to the Second Motion in Limine¹⁰⁷ and the Third Motion in Limine.¹⁰⁸ Amazon filed its Replies in Support of the Second Motion in Limine¹⁰⁹ and the Third Motion in Limine.¹¹⁰

At the January 21, 2021, hearing, the Court placed its findings and rulings on the record and denied the Third Motion in Limine because among other things, the Court concluded Morones possessed the requisite specialized knowledge called for under

⁹⁹ DE 346.

¹⁰⁰ DE 49 filed April 13, 2015.

¹⁰¹ DE 62.

¹⁰² DE 84.

¹⁰³ DE 89.

¹⁰⁴ DE 89. Interestingly, at trial the Trustee sought to admit into evidence excerpts of the "Deep Dive" data and Amazon objected, asserting the excerpts were attached to Justin Ice's deposition and he failed to establish foundation or authenticity. DE 332, Ex. A, pg. 3. The excerpts of the "Deep Dive" data were not admitted into evidence.

¹⁰⁵ DE 268.

¹⁰⁶ DE 270.

¹⁰⁷ DE 283.

¹⁰⁸ DE 285.

¹⁰⁹ DE 317.

¹¹⁰ DE 319.

1 Rule 702(a) of the Federal Rules of Evidence, that her expert report was the product of
2 reliable principles and methods, and that she reliably applied those principles and
3 methods. If the Defendant believed Morones was not armed with sufficient data to form
4 her expert opinions, the Court held that would be a matter best revealed through well-
5 crafted cross-examination by Defendant's counsel at trial.¹¹¹ Subsequently, at the
6 February 11, 2021, hearing, the Court placed its findings and rulings on the record and
7 denied the Second Motion in Limine.¹¹²

8 9 **VI. THE TRIAL**

10 Beginning on February 16, 2021, and concluding on February 19, 2021, the Court
11 conducted a four-day trial. Only four witnesses gave live testimony. The bigger end of
12 witness testimony was introduced via video depositions and designated portions of
13 deposition transcripts from 11 witnesses. The parties' closing arguments were heard on
14 February 24, 2021.

15 16 **A. Trial Exhibits**

17 The Parties' Joint Pre-Trial Statement stipulated to the admission of Joint Exhibits
18 1-12.¹¹³ Plaintiff's exhibits were marked 101-183 and were admitted by stipulation or
19 order of the Court or denied admission by the Court, as described in Attachment 2 to this
20 Order. Defendant's exhibits were marked 201-264¹¹⁴ and were admitted by stipulation or
21 order of the Court or denied admission, as described in Attachment 2 to this Order,
22 beginning at page 5 of 7.

23
24
25
26
27 ¹¹¹ DE 327.

¹¹² DE 358.

¹¹³ 332-1, p. 1 of 15. See also p. 1 of Attachment 2.

¹¹⁴ See DE 332, p. 124 of the PDF.

1 **B. Trustee's Witnesses**

2 1. Timothy Shaffer.

3 (February 16, 2021, 1:17 pm through 2:24 pm).

4 The Trustee's testimony was live, but some deposition designations were also
5 supplied.

6 The Trustee testified that when he was appointed in January 2012 the Debtor was
7 not profitable but became so by July 2012. The Debtor needed to achieve gross revenue
8 of \$1.5 million per month. That was happening by the 4th quarter of 2012. Not every
9 month but on average. Debtor filed its Plan in early 2013 calling for 100% payment to its
10 creditors. The Plan was going to be, in the Trustee's estimation, widely supported by the
11 Creditor's Committee and the Debtor's creditors generally.

12 Once Amazon terminated Debtor's use of its online platform in April 2013, Debtor
13 never again reached gross sales of \$1.5 million in any given month. Rather, Debtor's
14 gross sales thereafter failed to consistently reach \$1.0 million per month. Amazon
15 terminating Debtor's access to Amazon's online platform devastated Debtor's working
16 capital. Bellino and others reported to the Trustee that this termination severely spooked
17 Debtor's trade creditors who thereafter refused to supply product to the Debtor. Amazon
18 eventually permanently terminated Debtor's access to Amazon's online channels in
19 October 2013. This effectively put Debtor out of business because then Debtor had no
20 other online channel on which it sold its products. After January 2014 Debtor no longer
21 maintained a warehouse.

22 In 2012, the Trustee was told by Azzarelli, Debtor's contract CFO, that some of
23 Debtor's inventory was missing. Bellino told the Trustee that if the Debtor made
24 inventory claims against Amazon it would hurt the Debtor. After Debtor made a demand
25 upon Amazon for allegedly unaccounted inventory, Amazon eventually terminated
26 Debtor's access to the Amazon online sale platform.

27 On cross-examination the Trustee acknowledged directing Bellino on
28 December 15, 2012, to make a \$1 million demand on Amazon for lost or unrecorded or

1 unaccounted inventory.¹¹⁵ Instead, on December 17, 2012, Bellino made a \$10.5 million
2 claim against Amazon for the Debtor. Until his deposition, the Trustee was not aware of
3 the magnitude of Bellino's demand or that it conflicted with the Trustee's direction.

4 In a May 7, 2013, email from Bellino to the Trustee in which the Trustee asked
5 when Bellino sent a \$1 million demand to Amazon, Bellino simply said "12-17-2012"
6 without mentioning that the actual demand he sent to Amazon was for \$10.5 million.¹¹⁶

7 At trial Amazon focused at length on an email trail between Azzarelli and Bellino
8 on April 23, 2013¹¹⁷ concerning actual and projected revenue. While the Court admitted
9 these Exhibits, the Court finds it provides no probative value to Amazon's defense of
10 Plaintiff's claims.

11 On cross-examination the Trustee re-confirmed that Amazon's 15-day shutdown
12 of Debtor's access to the Amazon online platform shattered the confidence of Debtor's
13 creditors and damaged Debtor's cash flow and capital position. Moreover, this shut down
14 by Amazon caused three members of Debtor's Creditor's Committee to withdraw their
15 earlier support of Debtor's Plan.¹¹⁸ The Creditor's Committee's counsel confirmed this
16 fact to Trustee.

17 Plaintiff's counsel did not offer a re-direct examination of the Trustee.

18
19 2. Serena Morones

20 (February 16, 2021, 2:37 pm to February 17, 2021, 1:03 pm).

21 Except for a portion of her direct examination being supplied to the Court via her
22 Declaration, Morones' testimony was live.

23 Morones' direct testimony began with her 13-page Declaration¹¹⁹ but additional
24 direct and then her cross-examination and re-direct examination were live on the first and
25 second days of trial. Morones was called as Plaintiff's expert on Plaintiff's damages.

26 ¹¹⁵ Ex. 216.

27 ¹¹⁶ Ex. 12.

¹¹⁷ Ex's. 226-228.

¹¹⁸ Trial Transcript, February 16, 2021, at 1:22 p m.

¹¹⁹ Ex. 172, the "Morones Declaration."

1 Morones' Declaration pointed to her "Affirmative Expert Report" dated May 10, 2019,
2 which is hereafter referred to as Morones' Damages Report.¹²⁰

3 The Court will first address Morones' Damages Report, then Morones'
4 Declaration, and finally her examinations at trial.

5
6 a) Morones' Damages Report

7 Morones' Damages Report¹²¹ is a PDF document totaling 267 pages. She charged
8 Plaintiff at the rate of \$475 per hour.¹²² The Report itself is 28 pages but contains 6
9 schedules (including numerous sub-schedules) and 3 attachments. Attachment A is
10 Morones' curriculum vitae. Attachment B is the list of documents she considered in
11 preparing her Damages Report. Attachment C is a 26-page description of the basis for the
12 Settlement Data and M15 together with 190 pages of schedules. Attachment C is a
13 document describing how Morones came to sort the vast amount of data contained in the
14 Settlement Data and the M15 Data and how these two heaps of data were sorted and
15 merged to enable her to reach the conclusions made in Morones' Damages Report. By
16 way of an analogy, if the Damages Report was instead to answer the question, "what time
17 is it?" then Attachment C is an answer to the question, "how was that clock built?"

18 Attachment C indicates the Settlement Data includes (1) 747 text files containing
19 624,370,359 records where each record row describes a single type of transaction for an
20 order, (2) 696 Excel files containing 28,426,216 records with each row describing a single
21 type of transaction for an order and (3) two "Comma Separated Values" containing
22 1,804,115 records and 1,109,682 records, respectively. Some of the Excel and text files
23 contain over 100,000 lines. Altogether, these data mountains describe 4,471,104 customer
24 orders for 5,827,309 units which produced revenue totaling \$128,224,650 of which
25 \$33,176,475 was paid to (retained by) Amazon to cover its fees and expenses. Morones
26

27 ¹²⁰ Ex. 7.

28 ¹²¹ *Id.*

¹²² Morones' bills through June 14, 2019, forward at Ex. 202.

calculates that the average sales price per unit was \$22,¹²³ of which Amazon retained \$5.69 per unit.¹²⁴ Debtor, in turn, was paid \$95,048,175 or, on average, \$16.31/unit.¹²⁵

The first ten pages of Morones' Damages Report discusses the parties and their litigation. Beginning at § V, ¶ 28, she digs into her analysis. As with her Declaration, she summarizes her damages formula as

(1) Expected January 31, 2014, Ending Inventory

+ (2) Reimbursable Inventory Adjustments

+ (3) Unpaid Refund Reimbursements

+ (4) Sales Proceeds Not Remitted to Debtor

– (5) Reimbursements Paid by Amazon

= (6) Total Inventory Damage. These six calculation components are broken down in order below.

1. Expected January 31, 2014, Ending Inventory

To determine the January 31, 2014, ending inventory held by Amazon, Morones applied the inventory reconciliation formula described in Amazon's Seller Central website. That formula is as follows:

Starting Inventory

+ Receipts

- Customer Orders

+ Customer Returns

+/- Adjustments

- Removals to Debtor

Expected Ending Inventory

Looking at the M15 Data, Morones pegged the starting inventory as the total number of units placed by Debtor in Amazon's hands (6,316,429) and reduced that by the Sales¹²⁶ (5,978,113), Removals (344,906) and Adjustments (17,524) and added to that sum Customer Returns (63,445) for a grand total of 39,331 units. This amount was

¹²³ \$128,224,650 sales revenue ÷ 5,827,309 units sold.

¹²⁴ \$33,176,475 paid to or retained by Amazon ÷ 5,827,309 units sold.

¹²⁵ \$95,048,175 paid to Debtor ÷ 5,827,309 units sold. These calculations appear in Ex. 7, Attachment C, Schedule 1b at PDF page 31 of 267.

¹²⁶ Customer Orders are referred in Morones' Damages Report as "Sales."

multiplied by the average net price/unit (\$16.31)¹²⁷ to reflect an amount of \$641,521 due to Debtor.

2. Reimbursable Inventory Adjustment Transactions

Morones counts as “Reimbursable Inventory” the amount of inventory damaged, lost or stolen while in Amazon’s custody. Paragraph F-4 of the Contract¹²⁸ specifies that Amazon is liable to Debtor for such events. Morones reviewed the M15 Data and concluded 72,357 units were reimbursable to Debtor, calculated as follows:¹²⁹

Reimbursable Adjustments

| | | |
|--------------------------|-----------------|-----------------------------|
| Warehouse Adjustments | (from M15 Data) | 28,409 units |
| Lost/Found Adjustments | (from M15 Data) | 39,253 units |
| Mis-Received Adjustments | (from M15 Data) | <u>4,695 units</u> |
| | | 72,357 units ¹³⁰ |

Units in the Warehouse Damage Adjustments category were placed there by Morones when she saw Amazon’s application of Codes 5, 6, 7, D or E.¹³¹

Units in Morones’ Lost/Found category were placed there because these units had an assigned Code of M (Misplaced) or F (Found). M and F Codes were offset against one another because M is a negative unit and F is a positive unit.

Units in the Mis-Received category have a Code X designation reflecting that a unit was incorrectly added to inventory upon receipt. This would be a Non-Reimbursable Adjustment. The M15 Data showed 28,363 such units but Morones ascertained that 4,695 of those units were not correctly designated with Code X but, rather, were items lost by Amazon. Morones came to this conclusion because 4,102 of Code X designations occurred over 30 days after the unit was received by Amazon and Amazon’s 30(b)(6) witness, Jeff Moore (“Moore”), said Code X designations should be promptly made when one Amazon employee checks in a unit and soon thereafter another Amazon employee

¹²⁷ See Ex. 7, Schedule 1b.

¹²⁸ Ex. 1, PDF page 31 of 38.

¹²⁹ See Ex. 7, Schedules 2a, 2b and 2c.

¹³⁰ $72,357 \times \$16.31/\text{units} = \$1,180,202$

¹³¹ See the Amazon Code descriptions at Exs. 2 and 147 which are also attached hereto as Attachment 3.

1 does the same. A Code X designation corrects the first person's work. Morones also
2 found 593 units with a Code X where there was no receipt of such unit. Morones assumes
3 such units were lost in transit therefore obligating Amazon to pay for such lost units.

4 5 3. Unpaid Refund Reimbursements

6 When Amazon refunded a customer's purchase price the customer was generally
7 supposed to return the item so Debtor could re-sell the unit. If the unit was never returned
8 to Amazon, Morones claims it should not be back charged for the refund granted to the
9 customer. Morones found that Amazon reimbursed Debtor for some but not all the
10 unreturned refunds, leaving 27,255 units where Debtor was charged for refunds but not
11 credited for returned inventory.

12 13 4. Sales By Amazon, Not Returned to Debtor

14 Morones compared the M15 Data to the Settlement Reports which reflect
15 Amazon's payments to Debtor and found a difference of \$1,156,495. She assumes
16 Amazon did not pay Debtor these sales dollars.¹³²

17 18 5. Amazon Payments for Reimbursable Inventory Adjustments

19 Based on testimony from Amazon's employee Bachand, Morones concluded the
20 M15 Data was not reliable on the question of the amount Amazon reimbursed to Debtor.
21 Morones, therefore, looked at Settlement Reports to quantify these Reimbursements.
22 Morones concluded that Amazon reimbursed Debtor \$304,276 for damaged or lost units.
23 This reduces Morones' final calculated damage amount.¹³³

24
25
26
27
28 ¹³² See Schedule 4 to Ex. 7.

¹³³ See Schedule 5 to Ex. 7.

1 6. Interest Damages

2 Morones added prejudgment interest at 12% per annum from the midpoint of the
3 Amazon/Debtor relationship to arrive at a prejudgment interest damage amount of
4 \$2,906,22 through January 31, 2014.

5
6 7. Stay Violation Damages

7 Morones notes this Court found Amazon violated the automatic bankruptcy stay
8 when, without Court authority, it terminated Debtor's access to Amazon's online sales
9 platform on April 11, 2013, and did not turn access back on until 21 days later.¹³⁴ Morones
10 charts Debtor's sales activity for the 15 months prior to April 11, 2013 and through
11 October 22, 2013, the date of Amazon's final shut down of Debtor's access to the online
12 sales platform. Morones calculated average monthly sales from November 2012 through
13 March 2013, a time period of Debtor's stabilized income performance. To that average
14 Morones applied a .2% per month sales growth factor for the months of May 2013 through
15 October 2013. October was then trimmed back because of the October 22, 2013, platform
16 termination. Next, Morones looked at variable expenses¹³⁵ from November 2012 to
17 March 2013. Those expenses were deducted from revenues to deduce a contribution
18 margin profit of 9.7%.¹³⁶ Morones applied this 9.7% contribution margin profit to her
19 projected lost revenues from May 2013 through October 22, 2013, to arrive at a lost profit
20 damage amount of \$732,000.¹³⁷

21 All told, Morones' Damages Report reflected Debtor's inventory damages at
22 \$2,911,648, its stay violation damages at \$732,000 and its prejudgment interest on
23 inventory damages at \$2,906,224 for a grand damage total of \$6,549,871.

24
25
26 ¹³⁴ Ex. 7, page 22 of 267. Morones' Declaration later corrected this time frame to correctly note the shutdown was
15, not 21, days.

27 ¹³⁵ Variable expenses "include Cost of Sales, Outside Services – Lab or, Outside Services – Fulfillment, and
Packaging Supplies."

28 ¹³⁶ See Ex. 7, Schedule 6a.

¹³⁷ See Schedule 6.

b) Morones February 5, 2021, Declaration

Morones had 30 years of accounting experience including 23 years of work analyzing commercial damages and conducting forensic accounting investigations. She is based in Portland, Oregon. She was engaged by Plaintiff's counsel to analyze whether Amazon owes Debtor for inventory entrusted to Amazon by Debtor during the course of its business relationship from January 1, 2008 to January 31, 2014. Much of Morones' Declaration rehashes the information contained in Morones' Damages Report. She bases her damage calculations on the following formula:¹³⁸

| |
|--|
| Expected Ending Inventory on Hand January 31, 2014 |
| + Reimbursable Inventory Adjustment Transactions |
| + Unpaid Refund Reimbursements |
| + Sale Proceeds Not Remitted to Debtor |
| <u>- Reimbursements Paid by Amazon</u> |
| Total Inventory Damage |

Breaking down her damages formula, Morones reviewed the formula's six components by calculating the following:¹³⁹

1. Expected Ending Inventory:

Morones calculated Expected Ending Inventory through the following formula using the described data set:¹⁴⁰

| | | |
|---|----------------|-----------------|
| Inventory Units Received by Amazon from Debtor | (per M15 Data) | 6,316,429 |
| - Inventory Units Sold | (Per M15 Data) | - 5,978,113 |
| - Inventory Units Returned by Customers | (per M15 Data) | + 63,445 |
| - Inventory Units Removed back to Debtor ¹⁴¹ | (per M15 Data) | - 344,906 |
| - <u>Inventory Units Adjusted</u> | | <u>- 17,524</u> |
| Total Expected Inventory Units as of January 31, 2014 | | 39,331 |

¹³⁸ Ex. 7, page 14 of 267, ¶ 28.

¹³⁹ Ex. 7, page 15 of 267, ¶ 31.

¹⁴⁰ See Ex. 7, Schedules 1 and 1a.

¹⁴¹ Discussed below.

1 In analyzing “Expected Ending Inventory” Morones notes she was asked by
2 Trustee’s counsel to investigate “Removals Back to Debtor” from October 23, 2013¹⁴²
3 through January 31, 2014. “Removals” occur generally when Debtor requested units be
4 destroyed by Amazon or shipped back to Debtor. In either event, the units are Removed
5 from Debtor’s inventory Debtor Amazon’s hands. Debtor might make these requests, for
6 example, when a unit’s expiration date has come and gone. Counsel also asked her to
7 review the amount of unsellable inventory as of January 31, 2014.

8 Reviewing the M15 Data, Morones shows that Debtor’s “Removal” requests from
9 October 1, 2013 to January 31, 2014 totaled 88,405 units but that Debtor canceled 23,995
10 of those requests and that, after October 22, 2013 to November 31, 2014, Amazon shipped
11 or destroyed 62,103 units.¹⁴³

12 This exercise becomes interesting when Morones looked at the Seller Central
13 Report of December 2013¹⁴⁴ which indicated that Debtor had 28,390 units in Amazon’s
14 hands of which only 3,216 units were identified as unsellable and only 2,464 of those
15 unsellable units were “expired.” Morones assumed this Seller Central Report accounted
16 for inventory through December 31, 2013. Amazon employee Bachand testified that this
17 report was a snapshot as of December 13, 2013.¹⁴⁵ Bachand also testified that, with respect
18 to removals, there is a “creation date and a completion date of the removal. And the units
19 can actually have been removed at any point during that time frame.”¹⁴⁶

20 Unfortunately, Bachand’s testimony does not aid the Court in pinpointing how
21 many units were removed after December 13, 2013 and before January 31, 2014. The
22 Court finds the Debtor had 28,390 units in Amazon’s hands as of December 13, 2013. It
23 is not clear, nor can the Court find how many units were removed between December 13,
24 2013 and January 31, 2014. The M15 Report shows Debtor’s total inventory in Amazon’s
25 hands was reduced in January 2014 by 12,055 units (10,850 of which were Removed).

26 ¹⁴² The day after Amazon finally terminated its Contract with Debtor.

27 ¹⁴³ 88,405 removals requested less 23,995 canceled removal requests = 62,103 units.

28 ¹⁴⁴ The December 2013 Seller Central report was apparently the last report which Morones received for review.

¹⁴⁵ February 18, 2021, Trial Transcript at 153:11-12.

¹⁴⁶ February 18, 2021, Trial Transcript at 153:14-19.

Williams' Rebuttal Report shows Amazon Removed 19,890 units after January 31, 2014. Whether some of those removals were from a "creation date" (as Bachand would say) before January 31, 2014, is not clear. However, the Court finds the completion of those removals had to occur after January 31, 2014, because Williams' Report tells us 19,890 units were removed after January 31, 2014, i.e. the creation date and/or the completion date necessarily occurred after January 31, 2014. Units necessarily remained in Amazon's hands until the completion date. The Court finds that Amazon held at least 19,890 units of Debtor's products as of January 31, 2014, and that the completion of Removal of all those units occurred after January 31, 2014.

2. Reimbursable Adjustments:

Morones calculated Reimbursable Adjustments using the formula and the following described data set:¹⁴⁷

| | | |
|--|----------------|--------------|
| Warehouse Adjustments by Amazon ¹⁴⁸ | (per M15 Data) | 28,409 Units |
| + Lost/Found Adjustments by Amazon ¹⁴⁹ | (per M15 Data) | 39,253 Units |
| + Mis-Received Adjustments Made by Amazon ¹⁵⁰ | (per M15 Data) | 4,695 Units |
| Total Reimbursable Inventory Adjustments | | 72,357 Units |

This damage component is more fully discussed above where the Court reviews the Morones' Damages Report.

3. Unpaid Refund Reimbursements: 12,000 Units¹⁵¹

(Per M15 Data and Seller Central Report¹⁵²)

This damage component is more fully discussed above where the Court reviews Morones' Damages Report.

¹⁴⁷ Ex. 7, Tables 1 and 2a, 2b and 2c.

¹⁴⁸ As reflected in Amazon inventory codes D, E, 5, 6 and 7.

¹⁴⁹ As reflected in Amazon's inventory codes M and F.

¹⁵⁰ As reflected in Amazon's inventory code X.

¹⁵¹ $\$195,721 \div \$16.31/\text{unit} = 12,000 \text{ units}$.

¹⁵² The Seller Central Report is sometimes referenced as the Settlement Data.

1 4. Sales Proceeds Not Remitted by Amazon to Debtor: 70,907 Units¹⁵³
2 (Per M15 Data and Seller Central Report)

3 Morones indicates this figure represents the difference between sale orders
4 identified in the M15 Data as compared to the lesser amounts referenced in the Settlement
5 Data. She assumes Amazon had not reported these sales to Debtor for these increased
6 sales. Morones does note, however, that after delivering her Damages Report, Amazon
7 accounted for the six 48-hour periods¹⁵⁴ where the Settlement Data had not been produced,
8 which time period gaps largely accounted for this \$1,756,495 differential. Armed with
9 this new Settlement Data to fill in the Data Gap, Morones concedes her damage amount
10 for the line item “Sales Proceeds Not Remitted” from Amazon to Debtor should be
11 reduced to \$172,851¹⁵⁵ from the \$1,156,495 reflected in her Damages Report, so long as
12 Amazon “satisfactorily authenticated the additional data.” This Court finds Amazon
13 “satisfactorily authenticated the additional data” at trial. At best, Debtor’s damages for
14 the “Sales Proceeds Not Remitted” total \$172,851.

15
16 5. Reimbursements Made by Amazon to Debtor: 18,656 Units¹⁵⁶

17 This damages component is more fully discussed above where the Court reviews
18 Morones’ Damages Report.

19
20 6. Net Inventory Damage: 175,945 Units¹⁵⁷ @ \$16.31/Unit = \$2,869,663¹⁵⁸

21 To her inventory damage amount Morones adds prejudgment interest of
22 \$3,460,578 through January 31, 2021. This prejudgment interest calculation is made at
23 12% per annum at the “mid-term convention” between January 1, 2008 and January 31,

24
25
26 ¹⁵³ $\$1,156,495 \div \$16.31/\text{unit} = 70,907 \text{ units.}$

27 ¹⁵⁴ This is referred to herein and in Williams’ Rebuttal Report as the “Data Gap.”

28 ¹⁵⁵ This equates to 10,598 units ($\$172,851 \div \$16.31/\text{unit}$).

¹⁵⁶ $\$304,276 \div \$16.31/\text{unit} = 18,656 \text{ units.}$

¹⁵⁷ $\$2,869,663 \div \$16.31/\text{unit} = 175,945 \text{ units.}$

¹⁵⁸ This amount is down from the inventory damage of \$2,911,648 reflected in Morones’ Damages Report.

2021. From February 1, 2021, Morones would add a per diem rate of \$943¹⁵⁹ to the Plaintiff's inventory damages.

Next, Morones analyzes what would happen if her net price of \$16.31/unit attributable generally to Debtor's products entrusted to Amazon instead also disallowed Amazon's presumed fees and costs of \$5.69/unit.¹⁶⁰ If Debtor were to be paid the full \$22 average sales price on "Expected Ending Inventory" Debtor's damage number would increase by \$223,999.¹⁶¹ The Warehouse Adjustment damage number would increase by \$161,647.¹⁶² The Lost/Found Adjustment would increase by \$223,350.¹⁶³ The Mis-Received Adjustments would increase by \$26,715.¹⁶⁴

Morones' Declaration next turns her attention to perhaps the most hotly contested element of the Plaintiff's case – Code Q Adjustments. Morones notes the Trustee is claiming inventory damages for all inventory listed with a Code Q,¹⁶⁵ where that inventory is also listed as sellable. While Morones notes the M15 Data shows 166,279 units as bearing a Code Q, only 147,968 units were reflected as sellable. At \$16.31/unit damage to Debtor, Morones calculates the Code Q damages at \$2,413,470.¹⁶⁶

Morones' Declaration takes umbrage with Amazon's damage expert's Rebuttal Report. Morones criticizes the September 14, 2020, report of Williams for allegedly (1) failing to factor in downward inventory adjustments over the duration of the parties' relationship, (2) not acknowledging Unpaid Refund Reimbursements, (3) ignoring unpaid sales, and (4) counting inventory transactions after January 3, 2014.

Morones contends Williams deducts reimbursements from ending inventory rather than first adding adjustment transactions. This, she claims, results in a double deduction

¹⁵⁹ Or \$617 per day if Amazon "satisfactorily authenticated the" Gap Data.

¹⁶⁰ Morones "assumed a net cost per unit of \$22.00 reduced by \$5.69 per unit to account for Amazon's fees and costs." This Court presumes that by "cost per unit" Morones means \$22 is the price per unit paid by Debtor's customers and that the \$5.69 per unit reflects the amount Amazon would be entitled to retain from the \$22 per unit sales price, all pursuant to the parties' Contract.

¹⁶¹ 39,331 units x \$5.69/unit.

¹⁶² Morones say the increase would be \$161,740 but 28,409 units x \$5.69/unit = \$161,647.

¹⁶³ Morones says the increase would be \$223,478 but 39,253 units x \$5.69/unit = \$223,350.

¹⁶⁴ Morones says the increase would be \$26,730 but 4,695 units x \$5.69/unit = \$26,715.

¹⁶⁵ Also referenced as "Damaged-Miscellaneous."

¹⁶⁶ 147,968 units at \$16.31/unit is \$2,413,358 not \$2,413,470 as Morones indicates in her Declaration.

1 of liability transactions. Moreover, since a large number of Amazon's unit
2 reimbursements show no money paid for those units, she quantifies reimbursements in
3 dollars, not units, in contrast to what Williams does.¹⁶⁷ Morones notes that, although
4 Amazon says it removed 19,980 units after January 31, 2014, the M15 Data shows that,
5 as of March 31, 2015 (the last month of data reflected in the M15 Data), Amazon still held
6 20,405 units.

7 Finally, Morones' Declaration criticizes Williams on his stay violation damages
8 calculation, goes on to affirm her pre-judgment interest calculations and then notes her
9 corrected inventory per diem rate.¹⁶⁸

10 Summary: In conclusion, Morones' Declaration contends Plaintiff's damages total
11 \$4,868,556¹⁶⁹ or, if Amazon could not substantiate the Gap Data, \$7,062,241.¹⁷⁰

12
13 c) Morones' Direct, Cross and Re-Direct Examinations

14 At the outset of Day 2 of the Trial, the Court addressed the admissibility of Exhibits
15 247-252 and the Declaration of Amazon's custodian of records, Ershad Junaid. Through
16 hearing the arguments of counsel and comments by Morones, the Court learned that
17 Exhibits 247 – 252¹⁷¹ are six authenticated Amazon business records, each containing a
18 vast amount of data covering approximately 87% of the payment data which was missing
19 from the payment data Morones reviewed in preparing her Damages Report. Amazon's
20 expert Williams refers to this payment Data Gap in his Rebuttal Report. Exhibit 253
21 contains highlighted records pertaining to the payment Data Gap. Junaid's Declaration is
22 Exhibit 262. The Court overruled Trustee's objection to admitting these exhibits into
23 evidence and granted Amazon's request to admit Exhibits 247 – 253 plus Junaid's
24 Declaration (Ex. 262). Since these exhibits were authenticated as Amazon business

25
26 ¹⁶⁷ Ex. 172, ¶ 28(b).

¹⁶⁸ \$617/day per Morones' Declaration, down from \$1,057 referred in Morones' Damages Report, Schedule 1, Ex. 7.

27 ¹⁶⁹ Ex. 172 at page 6.

¹⁷⁰ Ex. 172 at page 4.

28 ¹⁷¹ The six documents collectively contain 15,845 pages of coding related to the Data Gaps of payment data missing from the Settlement Data reviewed by Morones.

1 records which fill 87% of the Data Gaps, Morones conceded that the damage component
2 described as “Sales Proceeds Not Remitted to Debtor” is \$172,851¹⁷² not the \$1,156,495
3 figure referenced in Morones’ Damages Report.

4 Morones noted in her live supplemental direct examination that the Seller Central
5 Data reflected less inventory on hand than the M15 Data. She noted the Debtor could only
6 seek Removal from Amazon’s inventory if it knew from the Seller Central Data that such
7 inventory units were in Amazon’s possession. Her Exhibit 178 showed Seller Central
8 Data indicated Amazon was holding 156,919 of Debtor’s inventory as of August 13, 2013,
9 yet the M15 Data showed that between September 1, 2013 and January 31, 2014, there
10 were requests to remove 164,629 units. Exhibit 179 showed M15 Data ending inventory
11 figures at month end (August through December 2013) consistently showed more
12 inventory than was reflected in the Seller Central Data. Exhibit 180, a document prepared
13 by Morones, shows 3,555 more units ultimately Removed by Amazon than Seller Central
14 indicated were held by Amazon on December 31, 2013.¹⁷³

15 In Amazon’s cross-examination of Morones she acknowledged that, before
16 working on this engagement, she had never worked on issues concerning Amazon’s
17 inventory system. Morones acknowledged that a considerable amount of information that
18 she considered in preparing Morones’ Damages Report was not listed in Attachment B of
19 that Report. She also confirmed she failed to timely reveal to the Oregon Board of
20 Accountancy a lawsuit filed against her. For this omission she was disciplined and
21 required to pay a \$250 fine. Morones also used a program created by Cone to help make
22 sense of the Seller Central Data made available to Cone. That program was never
23 produced by Plaintiff to Defendant.¹⁷⁴ She also acknowledged the Seller Central Data
24 does not necessarily reflect month ending inventory figures but the M15 Data does.
25 39,331 units are reflected in her Report as Ending Inventory for January 31, 2014.¹⁷⁵

26 ¹⁷² See Ex. 172, Morones’ Declaration, ¶ 11, page 6, segment 4.

27 ¹⁷³ As noted above in the section discussing Morones’ Declaration, testimony from Amazon’s Bachand indicates why
Exhibit 180 is flawed.

28 ¹⁷⁴ See Ex. 5, Fn. 8.

¹⁷⁵ See Ex. 172, page 4.

1 Morones confirmed Sales Proceeds Not Remitted is \$172,851 not the \$1,156,495 units
2 reflected in her Damages Report.¹⁷⁶ This difference is largely attributable to the Data
3 Gaps in the Seller Central Data. Morones also acknowledged her original Damages
4 Report failed to include an analysis of Code Q designated units. While Morones'
5 Declaration remedied this omission, she indicates that, of the 166,279 units designated as
6 Code Q in the M15 Data, 147,968 of those units are identified as sellable and should be
7 included in Plaintiff's damage amount.

8 Morones admitted not factoring Code N or O transactions into her Damages Report.
9 Morones confirmed the M15 Data does not contain data concerning payments by Amazon
10 to Debtor. Such payment information is contained only in the Settlement Data subset of
11 the Seller Central Data.

12 Cross-examination concerning Morones' stay violation damages revealed that,
13 while her Damages Report twice indicated Amazon shut down Debtor's access to the
14 Amazon platform for 21 days,¹⁷⁷ the correct shut down time frame was 15 days. Cross-
15 examination also delved into Debtor's sales activity prior to November 2012, revealing to
16 this Court that Debtor's sales were stabilized, not as of November 2012, but instead back
17 to July 2012. Cross-examination suggested some of Debtor's May to October 2013 sales
18 may have been forbidden to be sold on Amazon's platform and that some of its products
19 were priced far below normal prices.

20 In her re-direct examination, Morones indicated that, after reviewing information
21 from Williams' Rebuttal Report which filled in a big portion of the Data Gaps, she revised
22 her Amazon Reimbursements figure to (\$305,611), from Morones' Damages Report
23 number (\$304,276). This reduced her damages calculation by \$1,335.

24 Morones discussed Schedule 5 to Morones' Damages Report¹⁷⁸ explaining that the
25 Seller Central Data concerning Reimbursements paid by Amazon over the course of the
26 parties' relationship show Miscellaneous Adjustments and Balance Adjustments of

27 ¹⁷⁶ See Exs. 247 – 252.

28 ¹⁷⁷ Ex. 7, ¶¶ 21 and 56.

¹⁷⁸ Ex. 7, page 39 of 267.

1 \$304,276 while the M15 Data for the time frame show such adjustments as totaling
2 \$347,323. She said she would expect such M15 Data to be lower than the Seller Central
3 Data because the Seller Central Data is complete, but the M15 Data is not. She was
4 suggesting the M15 Data was incorrect in this regard.

5 Morones reviewed Exhibit 9, a March 1, 2019, email from Trustee's counsel to
6 Amazon's lawyer enclosing draft language to be included in the Disclosure Statement to
7 the Trustee's proposed chapter 11 Plan. The Disclosure language at page 8 of 16 mentions
8 Amazon shut down Debtor's access to its online platform on April 11, 2013, for 21 days.
9 This was apparently picked up by Morones in her Damages Report¹⁷⁹ but is incorrect as
10 the Debtor was shut out for 15 days, not 21.

11 Morones next testified concerning Williams' Rebuttal Report¹⁸⁰ where he says
12 Code E inventory is removed from inventory as compared to Williams' Declaration¹⁸¹
13 where he said Code E inventory is not removed from inventory but, instead, destroyed
14 (Code D) or moved out of inventory (Code O) and Reimbursed to Debtor. She
15 understands Removals to be units returned to Debtor or destroyed. Many Removable units
16 are unsellable. She understands Code E is a change from sellable to unsellable which item
17 would later likely be Removed (destroyed or returned to Debtor). This change, however,
18 does not reduce the overall number of inventory units. Morones had not observed an
19 Amazon policy consistent with Williams' revised opinion nor did she observe data which
20 would bear out his revised opinion in Code E treatment.

21 Morones was asked about Amazon's demonstrative exhibit¹⁸² which suggests the
22 maximum number of unaccounted units is 36,972. She disagreed with this. Among other
23 things she indicates "Removals" should total 10,284 more units so the unaccounted units
24 would be 47,256 units, not 36,972 units.

27 ¹⁷⁹ Ex. 7, page 12, ¶ 23 and page 22, ¶ 56.

¹⁸⁰ Ex. 5, ¶ 40.

¹⁸¹ Ex. 259, ¶ 32, Williams' Declaration dated February 4, 2021.

¹⁸² Ex. 263.

1 Morones noted that inventory units can be destroyed via Code D or Removals.
2 Williams, she says, indicates Code Q units are Removed not destroyed under a Code D as
3 suggested by four of the Defendant's demonstrative exhibit(s).¹⁸³

4 Morones discussed the list of Amazon's Fulfillment Reports,¹⁸⁴ which also
5 provides an inventory formula from which Morones calculated Plaintiff's damages. One
6 of the Fulfillment Reports is described as Inventory Reports.¹⁸⁵ One of the Inventory
7 Reports is a report called Inventory Adjustments.¹⁸⁶ This is where Amazon's inventory
8 codes are described and defined. These codes are important as there is much controversy
9 regarding application of appropriate codes and what happens when a unit is coded one
10 way or the other. The Inventory Adjustment Report is broken into the following code
11 categories: (1) the adjustment reason codes, (2) the misplaced (M) and found (F) inventory
12 codes, (3) the damaged inventory codes, (4) the unrecoverable inventory codes, (5) the
13 inbound shipment received adjustments, (6) the software connections, (7) the transferring
14 ownership codes and (8) the catalogue management codes.

15 Morones discussed Codes F, M, D, E, K, U, Q. She never saw an explanation that
16 Code Q (damaged-miscellaneous) or Code E (damaged at Amazon Fulfillment Center)
17 units would eventually be given a Code D (destroyed). She noted that 168,526¹⁸⁷ units
18 were given Code Q.

19 Morones turned to her Declaration¹⁸⁸ at ¶ 18 where she shows that, as of
20 December 31, 2013, Seller Central Data showed 28,390 units of which 3,216 were
21 unsellable, most of which were expired not damaged.

25 ¹⁸³ Ex. 264.

26 ¹⁸⁴ Ex. 148.

27 ¹⁸⁵ Ex. 171.

28 ¹⁸⁶ Ex. 147. See also Ex. 2. These are both attached to this Order collectively as Attachment 3.

¹⁸⁷ This number is inconsistent with her Declaration which, at ¶ 26, says these were 166,279 Code Q units referenced in the M15 Report.

¹⁸⁸ Ex. 172.

1 Morones read Amazon's discovery responses where it twice states that the M15
2 Data "contains all of the relevant data necessary to evaluate and calculate the Debtor's
3 inventory over time in the Fulfillment by Amazon Program."¹⁸⁹

4 According to Morones, the Settlement Data, not the M15 Data, provided the best
5 data on Reimbursements. She saw discrepancies in data produced in M15 Data as
6 compared to the Settlement Data. Amazon did not produce to Plaintiff a full set of
7 Settlement Data and the M15 Data does not provide all data concerning all the parties'
8 transactions, especially financial transactions.

9 Finally, Morones discussed units destroyed after January 2014. Her one-page
10 Table¹⁹⁰ shows starting inventory per the M15 Data as 39,331 units, that in September
11 2014 4,741 units were destroyed and as of March 2015 Amazon continued to hold 20,405
12 units of Debtor's inventory.

13 According to Morones, before taking into consideration Amazon's
14 Reimbursements to the Debtor or the 87% Data Gaps, which has now been filled by
15 Amazon's information, the Debtor's inventory damages total \$2,869,663.¹⁹¹ Morones
16 applied the following formula to determine this total¹⁹²:

| | | |
|----|-----------------------------------|--------------------|
| 17 | Expected Ending Inventory | \$ 641,521 |
| 18 | Reimbursable Adjustments | \$1,180,202 |
| 19 | Unpaid Refund Reimbursements | \$ 195,721 |
| 20 | <u>Sale Proceeds not Remitted</u> | <u>\$1,156,495</u> |
| | Total Inventory Damage | \$2,869,663 |

21 Per Morones, after subtracting payments made by Amazon to the Debtor for
22 Reimbursements and after subtracting the Data Gaps, which have now largely been filled,
23 the Debtor's net inventory damages total \$1,875,208, before application of prejudgment
24 interest.¹⁹³ Morones applied the following formula to determine this total¹⁹⁴:

25 ¹⁸⁹ Ex. 111, page 18, line 14 and Ex 116, page 11 at question 10, a October 30, 2018 letter from Amazon's counsel
26 to Plaintiff's counsel.

27 ¹⁹⁰ Ex. 182.

28 ¹⁹¹ Morones Declaration, page 4.

¹⁹² Id.

¹⁹³ Morones Declaration, page 6.

¹⁹⁴ Id.

| | |
|------------------------------|---------------------|
| Expected Ending Inventory | \$ 641,521 |
| Reimbursable Adjustments | \$1,180,202 |
| Unpaid Refund Reimbursements | \$ 186,247 |
| Sale Proceeds not Remitted | \$ 172,851 |
| <u>Amazon Reimbursements</u> | <u>(\$ 305,611)</u> |
| Net Inventory Damage | \$1,875,208 |

Morones was the second, and last, live witness called by Plaintiff.¹⁹⁵

3. Thomas Azzarelli

(February 17, 2021, 1:50 pm to 1:58 pm)

Azzarelli's testimony was given by videotape from his April 18, 2019, deposition played at trial plus additional designations. Although Exhibits were discussed in the Azzarelli deposition, those Exhibits were not attached to the Court's copy of the written deposition transcript.¹⁹⁶

Azzarelli was at some point an independent contractor hired to be the chief financial officer of Debtor. He was deposed on April 18, 2018. Azzarelli each month reviewed the Debtor's inventory numbers and came to understand that Debtor's inventory in the hands of Amazon was shrinking faster than sales of its units. Lost inventory and damaged inventory were discussed internally with employees of the Debtor. He did not know how much inventory was lost by Amazon, but it was "a lot."

Plaintiff introduced Azzarelli's direct testimony by designating portions of his deposition conducted on April 18, 2019. Prior to filing bankruptcy, Debtor retained Azzarelli as a part-time consulting Chief Financial Officer ("Consulting CFO") to the Debtor, and he stayed in that capacity through Debtor's bankruptcy. His post-petition role as Consulting CFO was to provide consultation to Debtor's management and to ensure the availability of experienced accounting and record maintenance during the pendency of the Chapter 11 proceedings.

¹⁹⁵ Attachment 4 is a list of all Plaintiff's deposition designations from the depositions of Azzarelli, Bachand, Ice, Moore, Lawcock, Bellino, Ashworth, Soder, Cone, Reilly and Shaffer.

¹⁹⁶ Those exhibits were, however, included in the List of Trial Exhibits. See DE 373.

1 In his deposition, Azzarelli testified that he was informed by Bellino of Amazon
2 losing Debtor's inventory and failing to properly reimburse Debtor. Azzarelli, however,
3 never received a report regarding the allegedly lost inventory or reimbursements. Azzarelli
4 spoke to Bellino's character, noting Bellino had the desire and ability to grow Debtor into
5 a successful company. Azzarelli also spoke to Shacklock's character, stating she was very
6 good at her position. Shacklock was the accounting manager for Debtor and she, along
7 with Lawcock, Peeples, and Reilly, reviewed Debtor's inventory each month. After
8 determining what the inventory was, Shacklock adjusted the Debtor's financial statements
9 according to the value she determined it to be for financial reporting. According to
10 Azzarelli, Shacklock stated Debtor's inventory seemed to be shrinking in value, as
11 reflected in the financial statements, which meant the inventory was going down faster
12 than she imagined it would be based on revenues generated.

13 The Court found Azzarelli's testimony credible but not particularly revealing
14 because he knew little about Debtor's relationship with Amazon or Debtor's inventory
15 management.

16
17 4. Justin Ice

18 (1:59 pm to 2:34 pm on February 17, 2021, and then from 9:10 am to 9:53 am on
19 February 18, 2021.)

20 Ice's testimony was via videotape of his July 18, 2017, deposition clips played at
21 trial plus additional designations from his 171-page deposition.

22 Ice was an Investigation Specialist for Amazon. He worked specifically as a
23 reimbursement specialist with the FBA Program. Ice testified about Amazon's inventory
24 processes and accountings — specifically, the Deep Dive and the M15 Data. The Deep
25 Dive is what Amazon refers to as a thorough review of the Debtor's top selling products.
26 Ice indicated that Debtor's inventory was stored in Amazon's fulfillment center or
27 warehouse in totes, bins, and shelves. He pointed to Ex. 154¹⁹⁷ as a graphic representation

28 ¹⁹⁷ See also the last page of Ex. 148. This exhibit is attached hereto as Attachment 5.

1 of how one can determine the amount of its inventory in Amazon's possession. Ice
2 discussed the fact that Amazon needed to re-write programs so its computer data would
3 provide better data to Amazon and its customers. Ice discussed the M15 Data but noted
4 it does not attempt to reconcile Debtor's inventory at Amazon. Among other things, the
5 M15 Data does not contain all data concerning the parties' sales transactions. Ice
6 discussed ASIN flips or mergers, which happen when units with a certain ASIN # contain
7 more than one SKU code. An ASIN # links product referenced on amazon.com to
8 products in inventory in Amazon's hands.

9 Ice also discussed Amazon's reimbursement process and the beginnings of the
10 FBA Program. Ice detailed how and when Amazon would process reimbursements and
11 explained different scenarios, which would trigger a reimbursement, like prohibited or
12 unsellable products. With respect to the FBA Program, Ice acknowledged the FBA
13 Program was started on the fly and improvements were necessary as the FBA Program
14 grew because of gaps in information provided to sellers.

15 Ice further testified about different adjustment codes used to help determine a
16 seller's inventory. Specifically, Code D is an adjustment code for destroyed products,
17 which is used when a product is so badly damaged it cannot be shipped back to the seller.
18 Code E stands for a change in the disposition of an item and would be used if a product
19 was damaged while waiting to be sold at the Amazon warehouse. Code Q is a
20 miscellaneous damage adjustment code used when Amazon is unable to determine the
21 cause or source of the damage.¹⁹⁸ Code M is used when a product is missing from its
22 designated location. Often missing product is placed in a holding account. Generally,
23 within 30 days, Amazon would reimburse sellers for any missing products. A
24 Reimbursement could take the form of payment to Debtor or new units credited to
25 Debtor's inventory at Amazon. Amazon would sometimes credit a seller's account if there
26 was inventory with the same FNSKU as the damaged product in the holding account.

27
28 ¹⁹⁸ However, Ice testified that he did not know the criteria Amazon used to determine whether to apply Code Q to a given unit. Ice Deposition at 133:14-15. Code Q is discussed at length in § VII(c)(4) below.

1 Transferring a product out of the holding account to a seller's account is referred to as a
2 Code N adjustment.

3 Ice further discussed the Deep Dive and the reconciliation process he went through
4 to try to determine why there were discrepancies between Debtor's data and Amazon's.
5 Some information Ice looked at was not available because problems with ASIN flips, out
6 of sync databases, and because the age of the information. Ice went through the M15 Data
7 to validate the information and ensure the data sets were marginally close to the
8 information he had pulled together during the reconciliation process. Ice acknowledged
9 during his deposition that the M15 Data did not include all the information available
10 because of the limited timeline and Debtor's long history. Ice also testified that he recalled
11 seeing reimbursements to Debtor for zero dollars but was unaware of the reason behind
12 this. However, Ice did report to his manager and an Amazon attorney that the
13 reimbursement information included in the M15 Data was underinclusive and was
14 incomplete with respect to transactions prior to 2012.

15 Finally, Ice testified about Amazon's inventory tracking process and acknowledged
16 that it would be nearly impossible to track an individual product from the time Amazon
17 received it until the time it was sold. To track a product from inception to sale, a seller
18 would have to perform additional research and connect where inventory adjustments
19 occurred to certain time stamps.¹⁹⁹

20
21 5. Tasha Bachand.

22 Bachand's testimony in Plaintiff's case was live at trial plus via clips from her
23 March 26, 2019, videotaped deposition plus additional deposition transcript designations.
24 Bachand was designated by Amazon to testify as its Fed. R. Civ. P. 30(b)(6) witness.

25
26
27 ¹⁹⁹ The Trustee analogizes this inventory accounting to one where a farmer deposits number of bushels of corn in a
28 cooperative's silo and later can sell that many bushels out of the silo. It will not be the same kernels of corn deposited
and sold by the same farmer, but the cooperative should track the volume of deposits and removed corn. See DE
396, p. 62.

1 Bachand started working for Amazon in 2015, about two years after this Adversary
2 Proceeding commenced. Bachand is an operations manager at Amazon. She was not called
3 as an expert witness in this case although she knows more about the M15 Data than anyone
4 at Amazon. Bachand first became involved in the Amazon/Trustee dispute in August
5 2016. She has knowledge of Debtor's inventory issues since 2011 but not before then.
6 The M15 Data is Amazon's best accounting of Debtor's inventory, but it does not contain
7 payment information. Payment information would be in the Seller Central Data,
8 specifically in the Settlement Data.

9 Bachand described Seller Central as an internal web portal where sellers can log in
10 to view information about their account and see the disposition of their inventory which
11 was delivered to Amazon. Seller Central also provided a formula for Debtor, and other
12 sellers, to manage and reconcile its inventory. The formula was: "starting inventory
13 balance

14 + received inventory
15 - customer orders
16 + returns
17 +/- adjustments
18 - removals
19 = ending inventory balance."

20 Debtor could have independently tracked its starting inventory balance, received
21 inventory, and removals but as to the remaining components, Debtor would have to rely
22 on Amazon to provide such information through Seller Central Data.

23 Bachand explained the difference between physical and virtual inventory. Physical
24 inventory is the inventory that is on the truck, in the tote, or in the bin. Virtual inventory
25 is what is shown through Seller Central and various Amazon reports. Even though
26 Amazon did regular checks on physical inventory to ensure it matched the virtual
27 inventory records, Bachand stated it was possible for the virtual inventory shown on Seller
28 Central to not always match the physical inventory at Amazon. She confirmed that, with
respect to Debtor, there were times this happened.

1 Bachand explained adjustment codes are a virtual way of tracking the physical
2 inventory. Employees in Amazon's fulfillment centers decide which adjustment codes
3 are used. The purpose of some of the adjustment codes are to make physical inventory and
4 virtual inventory match. For example, software corrections are used to correct inventory
5 discrepancies. She testified that software corrections reflected as Codes 1, 2, and J are not
6 considered in calculating the ending inventory balance.

7 Bachand explained Code X and Code Q and confirmed that there were 71,900 Code
8 Q adjustments to Debtor's inventory in July 2013. In reviewing the reimbursement chart
9 from the M15 Data, Bachand testified that there is no information showing whether
10 Amazon paid Debtor in product or dollars for inventory reimbursements that show up as
11 zero.

12
13 6. Jeff Moore.

14 (Video deposition shown at trial on February 18, 2021, beginning at 10:09 am and
15 ending at 10:47 am plus deposition designations.)

16 Amazon designated portions of Moore's December 5, 2017, six-hour videotaped
17 deposition testimony in response to designations offered by the Trustee. Moore's direct
18 examination was introduced through designations from his Fed. R. Civ. P. 30(b)(6)
19 deposition on December 5, 2017.

20 Moore is an Amazon employee who testified about Amazon's inventory processes.
21 He noted Debtor would not generally be given access to any of Amazon's fulfillment
22 centers. He discussed the M15 Data and indicated he worked on that with Ice until Ice
23 left Amazon. Since then, he has worked on M15 Data issues with Bachand.

24 Moore testified concerning the FBA Program's inventory check-in process at
25 Amazon's distribution and fulfillment centers. Moore explained an associate scans
26 inventory as it arrives and determines the seller and units included. During this process,
27 an associate counts the units in each shipment and inspects the unit for damage. If a unit
28 is damaged, the associate is to answer programmed questions in the internal software

1 system. Based on the answers, a specific adjustment code is assigned. After the shipment
2 is processed and checked for damage, the unit is placed in a tote (i.e., a plastic bin) and
3 sent to shelving where a second associate will store the unit on the unit's designated shelf.
4 Moore explained if a seller wants to inspect their inventory at an Amazon center, an
5 associate will generally conduct an audit of all the seller's inventory upon that request.

6 Moore further testified about the inventory reconciliation formula, which
7 represents a seller's ending inventory balance in Amazon's fulfillment centers. Moore
8 explained in detail the removal component of the formula, which is initiated by a seller's
9 unit return request. Any units not removed by a seller or sold to a customer would be
10 returned to the seller when the seller stops selling through the FBA program.

11 Moore also testified about different adjustment codes, which informs sellers
12 through Seller Central about the status of their inventory at Amazon. Moore described
13 Code X as a minus adjustment to inventory, meaning the number of units received were
14 less than expected. Code X is assigned contemporaneously with the unit being discovered
15 as missing. Moore also described Code M as the code assigned to missing units. If Code
16 M is assigned to a unit, Moore stated Amazon would reimburse the seller within 30 days.
17 Moore testified further on Amazon's process of identifying commingled products and how
18 missing and/or damaged units are handled. If a product is damaged and Amazon is
19 responsible, the seller receives the sale price less the fees. If a customer returns a damaged
20 product to the fulfillment center, an associate will conduct an analysis of the item through
21 a programmed questionnaire in the internal software system. This will tell the associate
22 whether Amazon or the seller is responsible for the damage.

23
24 7. Eric Soder.

25 (Soder's testimony was only by designated portions of his July 27, 2017,
26 videotaped deposition plus designations from his 63-page deposition transcript.)

27 Soder is a former Amazon employee who testified about Amazon's inventory
28 processes and the Debtor's inventory management. Soder began his career with Amazon

1 in 2008 as an account manager. In this role, Soder assisted sellers outside the FBA
2 Program with Amazon's website platform by helping navigate the website platform so
3 sellers could list their products.

4 Soder discussed ASIN which are designed to represent a product on Amazon's
5 website but not to track seller's inventory. Soder further discussed Amazon's ownership
6 determination software, which helps determine where a missing unit belongs in Amazon's
7 warehouses. Soder explained the process of identifying missing and misplaced items in
8 Amazon's fulfillment centers and how missing units are assigned a missing adjustment
9 code and reidentified products are assigned a Code F. Even if a missing product is found,
10 a damaged adjustment code will be reported in Seller Central. Soder further testified about
11 Amazon's cycle-count time-period. After a certain time, referred to as a "cycle-count,"
12 Amazon employees will rescan every barcode of every product in Amazon's warehouse.
13 The barcode will tell Amazon's internal system what the unit is, but not who owns that
14 unit.

15
16 8. Jeffrey Cone.

17 (Cone's direct testimony was by designated portions of his August 17, 2020,
18 videotaped deposition plus designations from his 140-page deposition transcript.)

19 The substance of Cone's testimony was limited to foundation for the analysis
20 underlying Morones' Damages Report and to responding as a rebuttal witness.

21 Cone was employed as a consulting expert witness by the Trustee. He testified by
22 deposition as to his role in helping Morones understand the M15 Data and Seller Central
23 Data used in Morones' Damages Report.

24 Specifically, Cone was tasked with figuring out what the M15 Data and the Seller
25 Central Data represented and comparing his analysis to Ashworth's, identifying points
26 where they reached different conclusions. To do this, Cone reverse engineered Ashworth's
27 conclusions back to the original data source. Although Cone testified they had different
28 numbers in some instances and could not recall the specifics, he did recall they had the

1 same number for Receipts.

2 Cone further analyzed inventory status reports and inventory activity reports from
3 Seller Central to understand general background information regarding Debtor's
4 inventory levels and activity. These reports were not the primary source for Morones'
5 calculation but supported Morones and her team's position regarding adjustments. Cone
6 testified that he confirmed the M15 Data and Seller Central Data had not been modified.

7 Lastly, during his deposition, Cone acknowledged gaps in their analyses were
8 caused by missing Settlement Reports. He stated that, even if those gaps were filled, their
9 conclusion would have remained the same. The calculation for unremitted sales to Debtor
10 in Morones' Damages Report did not consider the gaps because the calculation was based
11 on the M15 Data, not the Settlement Reports. Furthermore, the gaps were only for the time
12 periods of January 2010 and March 2010.

13
14 9. Stephen Ashworth.

15 (Ashworth's direct testimony was by designated portions of his August 19, 2020,
16 videotaped deposition plus designations from his 91-page deposition transcript.)

17 Ashworth's testimony was limited to foundation for exhibits and to respond as a
18 rebuttal witness. Ashworth was employed by the Trustee as a consulting expert witness
19 and testified as to the documents and data he collected from the Debtor as well as his
20 coordination with Morones and Mr. Cone in the development of Morones's Damages
21 Report.

22 Ashworth accessed Seller Central starting in October 2013 up until the production
23 of the M15 Data and downloaded all available relevant data related to Debtor's
24 transactions and inventory. Ashworth testified about the specific information he looked
25 for in Seller Central including inventory event detail reports, monthly ending inventory
26 reports, individual transactions, and Settlement Reports.

27 Ashworth explained the difference between various types of Amazon's reports and
28 discussed how Settlement Reports are exclusive to sales in that they show money

1 exchanged between Amazon and Debtor. Inventory reports include things such as receipts
2 and adjustments and show the inner movement of inventory in Amazon's warehouses.
3 Ashworth further testified about the process for retrieving Settlement Reports from
4 different time periods. Ashworth first began by downloading Settlement Reports between
5 January 2012 and February 2014. Next, to obtain Settlement Reports prior to January
6 2012, Lawcock and Peeples downloaded the Settlement Reports and produced them to
7 Ashworth. Ashworth noticed gaps only in Settlement Reports Lawcock and Peeples
8 produced.

9 Lastly, Ashworth testified about the information and various reports he sent to
10 Cone and Morones. Ashworth noted that during the 2014 mediation, Amazon discussed
11 certain sales transactions not reported in Seller Central Data and that they were uncertain
12 whether the Debtor was paid for those transactions. This, in Ashworth's opinion, is what
13 led to the production of the M15 Data.

14
15 10. Sean Lawcock.

16 (Lawcock's direct testimony was by designated portions of his April 23, 2019,
17 videotaped deposition plus designations of his 158-page deposition transcript.)

18 Lawcock's testimony was limited to foundation for exhibits and to respond as a
19 rebuttal witness. Lawcock was Debtor's former inventory manager. He testified as to the
20 Debtor's inventory management practices, the Debtor's internal inventory tracking
21 difficulties, and the December 2012 inventory audit that serves as the basis for Amazon's
22 fraud claims.

23 Lawcock began his career with Debtor as a purchaser on the merchant side and
24 switched to a software specialist/inventory manager around 2011-2012.

25 Prior to Debtor's bankruptcy, while Lawcock was a purchaser, he created an
26 internal tracking system for his own personal inventory. This system was built specifically
27 for the Merchant Program, not the FBA Program. Post-bankruptcy, Lawcock started
28 tracking the Debtor's Settlement Reports so he would know when Amazon reversed a

1 sale. Amazon would reverse sales if a product was unsuccessfully shipped to the customer
2 or returned. The Settlement Reports had a column listed as "Other," which included a
3 lump sum dollar amount for various items such as reimbursements and fees, making it
4 difficult to independently track reimbursements. Eventually the Settlement Reports put
5 reimbursements into its own category. Lawcock testified he had a poor experience in
6 getting reimbursements from Amazon because he was consistently told by Amazon it was
7 against their policy to refund for certain products, but he never received a reference to the
8 actual policy stating this. He also testified that there were hundreds of instances where
9 Amazon would state products were shipped to the Debtor's warehouse even though he
10 had the packing slips, and the products were not there.

11 Lawcock discussed the Removal process implemented at Debtor and specifically
12 the automated Removal program which Amazon offered to sellers. Lawcock noted the
13 Debtor switched to a manual Removal program from an automated Removal program
14 because, under the automated Removal program, products were randomly sent to Debtor
15 and packaging slips were included less than 25% of the time. Without packaging slips,
16 Debtor was unsure where the original product came from and why it was coming back.
17 The automated Removal program also did not include reporting, which resulted in Debtor
18 having to pull the return report from Seller Central and review each product to see if there
19 was an item related to the order. If Debtor was unable to find a related item, Debtor would
20 contact Amazon seller support group and request a reason for the returned product, a
21 Removal order, and the original SKU. Under the manual Removal program, Debtor was
22 able to implement a process and track which units were coming back to Debtor and why.

23 In December 2012, Lawcock conducted an historical audit of Debtor's entire
24 inventory based on inventory data available in Seller Central for the years 2008 to 2011
25 to determine the amount of inventory which should have then existed. As part of the
26 auditing process, Lawcock identified discrepancies and then worked with seller support
27 to resolve the discrepancies by either correcting the inventory count or receiving a
28 reimbursement. At the end of the audit, Lawcock concluded there were 151,871 missing

1 units from 2010 through 2012 and submitted this to Amazon for reimbursement at
2 Bellino's direction. In his deposition, Lawcock explained the 151,871 missing units were
3 "gross missing units" that excluded the positive overages from Amazon. Lawcock
4 believed Amazon misreported 151,871 units of Debtor's inventory and these units were
5 unaccounted for in Debtor's inventory, regardless of the overages being taken into
6 account. When asked how 151,871 units could have gone missing from 2010 through 2012
7 without the Debtor's knowledge, Lawcock explained it was because the auditing process
8 had not begun until 2012.

9
10 **11. Daniel A. Bellino**

11 (Bellino's direct testimony was by designated portions of his April 22, 2019,
12 videotaped deposition plus designations from his 265-page deposition transcript.)

13 Bellino's testimony was limited to foundation for exhibits and to respond as a
14 rebuttal witness. Bellino was the Debtor's former CEO. He testified as to the Debtor's
15 business practices; the Debtor's participation in the FBA Program; the Debtor's lack of
16 inventory tracking, management, and organization; and the Debtor's reimbursement
17 claims.

18 Bellino was the founder and Chief Executive Officer of Debtor. The designated
19 portions of his depositions include situations in which Bellino could not answer a question
20 based on lack of information or inability to recall the exhibit or fact. This testimony was
21 not particularly revealing.

22
23 **C. Motion for Directed Verdict**

24 At the conclusion of Plaintiff's case on trial day 3 at 11:35 am, Amazon moved for
25 a directed verdict arguing that since the M15 Data was not admitted into evidence in
26 Plaintiff's case, there was insufficient data to support Plaintiff's damage claims on Counts
27
28

1 1 and 3 of the Complaint. The Court denied Amazon's motion. Exhibits 131²⁰⁰ and 161²⁰¹
2 were admitted into evidence.

3
4 **D. Amazon's Witnesses**

5 1. Tasha Bachand

6 (February 18, 2021, at 10:45 am to 11:27 am (Video) and February 18, 2021 at
7 1:05 pm to February 19, 2021 at 1:40 pm (Live))

8 Plaintiff introduced portions of Bachand's videotaped deposition²⁰² in his case in
9 chief. Defendant called Bachand as a live witness in its case and designated portions of
10 her March 26, 2019, 76-page deposition. Bachand discussed Amazon's FBA Programing
11 inventory processes, inventory codes used by Amazon, the Deep Dive, the Seller Central
12 Data and the M15 Data.

13 Bachand began working for Amazon in 2015, well after Amazon terminated
14 Debtor's access to amazon.com and well after Plaintiff commenced this Adversary
15 Proceeding. Bachand has been an Amazon manager for two years. She first became
16 involved in Debtor's inventory issues in August 2016, over three years after this
17 Adversary Proceeding was commenced.

18 Bachand described an ASIN Merge as a consolidation of two or more ASIN's into
19 one ASIN. She talked about having done a deep dive on some products. She indicated
20 the M15 Data cannot be used to draw some of the conclusions Morones drew about
21 Adjustments, Reimbursements and amounts unpaid by Amazon to the Debtor. Some
22 Adjustments duplicate the coding of certain units. M15 Data does, however, show the
23 total quantity of units "Adjusted."

24 In discussing the nature of Code Q designations for a given unit, Bachand
25 confirmed that every single Code Q unit is accounted for somewhere else as a Code D

26
27 ²⁰⁰ M15 Data.

²⁰¹ Seller Central Data.

28 ²⁰² Attachment 6 is a list of all the deposition designations by Amazon from the depositions of Azzarelli, Bachand, Ice, Lawcock, Moore, Bellino, Ashworth, Soder, and Cone.

(destroyed), 5 (unrecoverable), M (misplaced) or Removed (destroyed or shipped back to Debtor per Debtor's request). For these reasons, Amazon contends Code Q does not signify Amazon liability to Debtor.²⁰³

Bachand indicated that Code Q was inaccurately described on Seller Central so, in 2018, Amazon revised the description in its Inventory Adjustments web page.²⁰⁴

Bachand discussed Ex. 245 and how when the Debtor on October 17, 2013, turned off the auto-Removal setting for its inventory account with Amazon. Any Removal requests would need to be made manually by Debtor thereafter. If a unit is useless for more than 90 days and Debtor has not asked that it be removed, Amazon would thereafter destroy that unit.

Bachand indicated that, while M15 Data stops at month end, Settlement Data does not. This is one more reason these two data sets are not an exact match.

Bachand agrees with the following data in the Morones' Declaration:

| | |
|----------------------------------|-----------------|
| 1. Expected Ending Inventory | <u>Units</u> |
| Receipts | 6,316,429 |
| Sales | -5,978,113 |
| Customer Returns | +63,445 |
| Removals | (344,906) |
| <u>Adjustments</u> | <u>(17,524)</u> |
| Inventory as of January 31, 2014 | 39,331 |

What Bachand does not agree with from Morones' Declaration is her numbers concerning:

(a): 2. Reimburseable Adjustments: 72,357 Units

Bachand noted there is some overlap of an unknown quantity between this line item from Morones and Adjustments or Removals referenced in the M15 Data or Seller Central Data.

(b): 3. Unpaid Refund Reimbursements \$186,247

²⁰³ DE 364, February 18, 2021, trial transcript at pg. 112.

²⁰⁴ See n.17 above. The Court will not factor these 2018 revisions in this Order.

1 This information cannot be accurately surmised from the M15 Data, and

2 (c): 4. Proceeds Not Remitted \$172,851²⁰⁵

3 Just because the M15 Data does not exist to refute this number²⁰⁶ does not mean
4 Debtor has proven a shortfall in sales proceeds remitted by Amazon to Debtor.

5
6 2. E. Weiant Williams

7 (February 19, 2021, from 1:43 pm to 4:00 pm)

8 E. Weiant Williams' ("Williams") direct testimony at trial was via his ten-page
9 Declaration²⁰⁷ ("Williams Declaration"). Williams' Rebuttal Report dated September 14,
10 2020,²⁰⁸ is attached to his Declaration as Exhibit A. The Court will first address Williams'
11 Rebuttal Report then his Declaration and, finally, his trial testimony.

12
13 a) Williams' Rebuttal Report of September 14, 2020

14 Williams is an Illinois certified public accountant and managing director of The
15 Claro Group. His career has largely been focused on forensic accounting and accounting
16 consultancy, especially in claims and disputes. His curriculum vitae is attached to this 36-
17 page Rebuttal Report²⁰⁹ as Exhibit 1. He charged \$375 per hour for this engagement. A
18 list of the information reviewed and considered in preparation of the Rebuttal Report is
19 attached to that Report as Exhibit 2.

20 Williams agrees with Morones in several respects. He agrees the data shows
21 Amazon received 6,316,429 units from Debtor of which 5,978,113 units were sold. He
22 also agrees that Morones is essentially right in determining that Returns²¹⁰ total 63,445
23 units. That's about the sum total of their consensus.

24
25
26 ²⁰⁵ § VI(B)(2)(c) above.

27 ²⁰⁶ *Id.*

28 ²⁰⁷ Ex. 259.

²⁰⁸ Ex. 5. The "Rebuttal Report."

²⁰⁹ Ex. 5.

²¹⁰ A Return is defined as the reversal of a sale upon a customer's refund request. See Attachment 1.

Williams' presents six opinions, two related to unaccounted inventory, two related to proceeds unremitted to Debtor, one concerning prejudgment interest and one concerning stay violation damages. These opinions are discussed in order below.

Williams breaks Unaccounted Inventory Damages down into two categories, Expected Ending Inventory and Reimbursement Adjustments.

Opinion 1 – Expected Ending Inventory. Morones' Damages Report calls for damages of \$641,521 for unaccounted inventory.²¹¹ Williams says the correct measure of such damages is between \$0 and \$137,516. The difference is, in part, because Morones used January 31, 2014, as the last date she considered inventory transactions. However, after that date, Amazon removed 19,890 units.²¹² Williams contends the maximum unaccounted units total 20,405 but that Amazon gave Debtor Reimbursements for 28,541 units²¹³ leaving Amazon having over-Reimbursed Debtor by 8,136 units. Williams finds Defendant owes nothing to Debtor for unaccounted units. If Adjustments are not considered, Williams says unaccounted units are, at most, 8,431 units which, at \$16.31 per unit, brings damages for unaccounted units to \$137,516.

Opinion 2 – Reimbursement Adjustments. Continuing with his discussion of unaccounted inventory, Williams' second opinion is that Morones incorrectly added to her damage calculation \$1,180,202²¹⁴ for Reimbursable Adjustments. In his view the data does not reliably show how many lost or damaged units Amazon is responsible for and which are not otherwise accounted for by Reimbursements Inventory transferred by Amazon into Debtor's account and units which are already tallied as Unaccounted Inventory.

²¹¹ This number is the same in both the Morones Report and Morones Declaration.

²¹² Valued at \$324,406 (19,890 units x \$16.31/unit). 12,107 units were shipped back to Debtor while 7,783 units were destroyed per Debtor's request. Exhibit 5 attached to trial Ex. 5 at page 73 is a chart that has two columns marked as "Post 1/31/2014." The Court assumes the first of these two columns was meant to be identified as "Pre 1/31/2014."

²¹³ Williams' states that the M15 Data shows Amazon actually reimbursed Debtor for 41,911 units but only the "Warehouse Lost/Damage" amount of reimbursed units should be included here.

²¹⁴ 72,357 units.

Adjustments are made through a series of codes such as Code F (unit Found), Code D (unit Destroyed), etc. These Adjustments can increase or decrease the Debtor's inventory balance, or they can change a unit status from sellable to unsellable without a change to the overall inventory balance.

Williams contends Amazon's Adjustments codes cannot be used to determine the quantity of units that have been damaged, lost or stolen and for which Amazon is liable. There is not a 1:1 correlation between Adjustments transactions and discrete units. His reasons for this contention are:

(a) A given unit of inventory cannot be traced from Receipt to disposition through the M15 Data. Morones used the M15 Data to attempt this tracing.²¹⁵

(b) A given unit can have several coding events while in Amazon's possession. That unit could be booked as a Receipt, but later coded as mis-placed (Code M), then found (Code F), then damaged in Amazon's fulfillment center (Code E), and finally Removed (i.e. sent back to Debtor or destroyed). If the total amount of mis-placed inventory is added to the total number of units destroyed there will be some overlap. The extent of that overlap cannot be ascertained through the M15 Data.

(c) Numerous codes do not signify a final disposition which would increase or decrease the number of Debtor's inventory units. Codes P, E, H, K, Q, U, 6 and 7 result in a re-characterization between sellable and unsellable units. Using any of the M15 Data pertinent to units bearing these codes will incorrectly increase or decrease Morones' damage calculations.

(d) Some coded data does not necessarily reveal who is responsible for the changed status of a given unit. A Code D (destroyed unit) could be Debtor's loss (if, for example, it was destroyed because the unit was defective) or could be a loss for which Amazon is responsible (i.e. a unit damaged at Amazon's warehouse).²¹⁶

²¹⁵ Morones herself noted this same problem and indicated she worked with total unit counts not individual units. See Trial Ex. 7 at Bates No. 700006.

²¹⁶ See DE 310, Williams' December 21, 2020, Declaration at page 6, ¶ 16e which further discusses this scenario.

1 (e) The final disposition of a unit may not be reflected in Adjustments. If a unit is
2 given a Code E it will likely be Removed but that Removal will not alter the number of
3 units which were given a Code E. Some of those Code E units may remain in Ending
4 Inventory, albeit as an unsellable unit.

5 (f) Morones assumes that a Lost/Damages Adjustment must give Debtor a
6 reimbursement, but Amazon could simply replace the misplaced unit (Code M) with an
7 identical unit owned by Amazon (Code N). Morones did not account for Code N units.
8 The M15 Data indicates there were 16,585 Code N units.²¹⁷

9 At bottom, Williams contends that Morones' claim that Amazon is liable to Debtor
10 for 72,357 units of Reimbursable Adjustments is based on unreliable assumptions
11 pertaining to the three components of her Reimbursable Adjustments.²¹⁸

12 Williams Rebuttal Report next focuses on two components of proceeds unremitted
13 to Debtor by Amazon. Those components are sales proceeds not remitted to Debtor and
14 Unpaid Refund Reimbursements.

15 Opinion 3 - Sales Proceeds Not Remitted to Debtor. Generally Williams asserts
16 that Morones' analysis "regarding the unremitted proceeds are fraught with false
17 assumptions and based on incomplete data, both of which lead to incorrect and unreliable
18 conclusions."²¹⁹ Williams notes Morones reliance on the Settlement Data to determine the
19 \$1,156,495 amount of sales proceeds not remitted to Debtor failed to account for six data
20 gaps of 48 hours.²²⁰ Morones and Cone were aware of these Data Gaps, but she did not
21 disclose this in Morones' Damage Report. When Amazon retrieved some of the
22 information that could help fill the Data Gaps, it accounted for 87% of the so-called
23

24 ²¹⁷ Williams' Declaration at DE 310 also discussed Code 6 adjustments (damage by inbound carrier). Note that a
25 Code 6 damage could be an Amazon responsibility (if Amazon's carrier was used) or a Debtor responsibility (if a
26 non-Amazon carrier was used). This further highlights the problem with using a given code as applicable to
27 universally lay the damage responsibility on one party or the other. The Trustee reveals that only 2 units were coded
28 6. See DE 396, p. 62, citing Trial Ex. 5, Williams' Rebuttal Report at Ex. 5.

²¹⁸ Those three components are (1) Warehouse Damage Adjustments (Codes D, E, 5, 6, and 7), (2) Lost/Found
Adjustments (Codes M and F) and (3) Mis-Received Adjustments (Code X).

²¹⁹ Trial Ex. 5, ¶ 46.

²²⁰ Defined by the Court as the Data Gaps. See Attachment 1.

unremitted sales proceeds.²²¹ Williams did not focus specifically on the \$172,851 which Morones' Declaration indicates would remain if the Data Gaps are filled.

Opinion 4 - Unpaid Refund Reimbursements. Williams points out that Morones' calculated Unpaid Refund Reimbursements as \$237,706 yet she failed to account for \$41,985 of refunds reflected as "miscellaneous order adjustments." Seeing this error, Morones's Declaration corrected her damage number down to \$195,721.²²² Williams points out that Morones appears to assume all Refund Reimbursements would appear in the Settlement Data as "refund reimbursal" but ignores the data showing some "refund reimbursements" are captured in "miscellaneous order adjustments."

Opinion 5 – Prejudgment Interest. Williams recounts how much of Morones damage amounts are incorrect. Then he calculates interest from the Complaint date²²³ at the same 12%²²⁴ used by Morones. He also criticizes Morones' use of the "mid-point of Debtor's relationship with the FBA Program."

Opinion 6 - Stay Violation Damages. Williams Rebuttal Report calculates Debtor's stay violation damages to be, at most, \$47,497.²²⁵ He notes the period of the stay violation was 15 days²²⁶ not 21 days as reported by Morones. He criticizes her for her use of a five-month damage period following the stay violation, suggesting there is no proof of such continued damage. Next, Williams contends Morones' use of a baseline period from November 2012 to March 2013 is wrong because the Debtor's sales had stabilized by July 2012. The average sales for those four earlier months were 14% less than the November to March sales. Finally, Williams claims Morones erred by assuming a sales growth rate from April through October 2014, while sales topped out several months before the stay violation. Using a July 2012 to March 2013 baseline period, Williams calculates Debtor's April 2013 revenue at \$1,495,357. The contribution margin would be

²²¹ Morones declared that, if 87% of the Data Gaps were filled by this new information, the sales proceeds unremitted would drop to \$172,851.

²²² See Morones' Declaration (Ex. 172) at page 4 but then her chart at page 6 states this number should be \$186,247.
²²³ July 9, 2013.

²²⁴ 12% is the legal rate under Washington law. The parties' Contract is governed by Washington law.

²²⁵ See Exhibit 10 attached to his Report.

²²⁶ April 11, 2013 to April 25, 2013.

1 9.8% or \$147,165. Since Debtor's actual April 2013 contribution margin was \$99,668,
2 he calculates that Debtor's stay lift damages would not exceed \$47,497.²²⁷ Williams finds
3 insufficient support for any damages after Amazon re-opened its online platform to Debtor
4 after April 25, 2013.

5 In summary, Williams finds Plaintiff's damages could not exceed:

6 (1) Unaccounted inventory - \$0, if Adjustments are factored in. If Adjustments are
7 not factored in it would produce a number for damages based on unaccounted inventory,
8 of \$137,516. Prejudgment interest on that amount would be \$118,602,

9 (2) Proceeds unremitted to Debtor - \$0,²²⁸ and

10 (3) Stay violation damages - \$47,497 resulting in total maximum damages of
11 \$303,615.²²⁹

12
13 b) Williams Declaration

14 Williams' direct evidence at trial was presented in the form of his ten-page
15 February 4, 2021, Declaration/Direct Testimony of E. Weiant Williams ("Williams
16 Declaration").²³⁰ Attached as Exhibit A to the Williams Declaration is his Rebuttal Report
17 from September 14, 2020.²³¹

18 Williams Declaration is broken down into the same six opinions stated in his
19 Rebuttal Report. His Declaration does not address changes made to Morones' Damages
20 Report in her February 5, 2021, Declaration because, of course, Williams' Declaration
21 was filed a day before Morones' Declaration.

22 Williams includes Table 1²³² which summarizes his calculations with and without
23 Adjustments applied. Williams also corrects his Rebuttal Report to clarify that units
24 designated with a Code E (damaged at Amazon's fulfillment center) are not Removed but,

25
26 ²²⁷ \$147,165 less \$99,668 = \$47,497.

27 ²²⁸ But this seems to omit the \$186,247 of Unpaid Refund Reimbursements.

28 ²²⁹ This would become \$489,862 if the unremitted proceeds number is \$186,247.

²³⁰ Ex. 259.

²³¹ See Ex. 5.

²³² DE 259 at ¶ 31.

1 rather destroyed (Code D) or transferred out of inventory (Code O). Next, Williams offers
2 two hypotheticals that explain why his inventory accounting methodology is correct and
3 compares it to how he believes Morones' methodology would produce an incorrect tally
4 of units handled by Amazon. Finally, Williams declares that, from January 2013 through
5 June 2013, the Debtor paid Amazon fees of \$2,206,369.²³³

6
7 c) Williams' Cross and Re-Direct Examinations

8 (February 19, 2021, at 1:43 pm to 4:00 pm)

9 Williams' direct examination was exclusively done by his Declaration. His cross-
10 examination revealed the following:

11 Williams noted he had never testified in court as an expert, nor had he ever before
12 done work for Amazon. Williams billed his time in preparing his Report at \$375 per hour.
13 Through October 2020 he and his group at Claro had billed \$382,000 for the Rebuttal
14 Report work.

15 Williams interviewed none of the 14 people listed by Amazon as likely to have
16 discoverable information.²³⁴ He did, however, interview three Amazon employees
17 (principally Bachand) but none of them worked for Amazon from 2008 to 2013. His first
18 interview was on June 14, 2019.²³⁵

19 Williams indicated one must read the Inventory Adjustment document to
20 understand how Amazon reconciles inventory it held for the Debtor. He also pointed to
21 the Seller Central inventory policy,²³⁶ which policy was periodically updated or revised.
22 Williams described the Seller Central Data as going to the financial data of the parties'
23 relationship whereas the M15 Data is about the Debtor's inventory held by Amazon.
24 Williams described the M15 Data as an "extremely, extremely large data set." He

25
26 ²³³ Williams does not explain why that time frame is relevant or what data he relied upon to conclude the amount
27 paid to Amazon.

28 ²³⁴ Ex. 104.

²³⁵ Ex. 105.

²³⁶ Ex. 148.

1 acknowledged Amazon had a duty to maintain contemporaneous data records but does not
2 know whether that duty extends to preservation of that data.

3 Williams acknowledged his Rebuttal Report was incorrect concerning Code E
4 (damaged at Amazon fulfillment center) implications. He corrected this error in his
5 Declaration. Code E is not a code signifying Removal of a unit. Not all unsellable units
6 (like Code E units) are subject to Removal. Not all of the 10,000 Code E units correspond
7 to one unit per Code E designation.

8 Williams indicated Code O (Out) units are unrelated to Code N (In) units. He says
9 Code Q (Damaged-Miscellaneous) units are unsellable but are not chargeable to Amazon.
10 A “Q” coding does not reduce units in Debtor’s inventory count. Amazon is not liable for
11 a Code Q unit he says. Code Q was the most heavily used Inventory Adjustment code in
12 the M15 Data at 168,526²³⁷ units. Williams thinks the Code Q definition was poorly
13 written by Amazon.

14 Williams discussed the M15 Data’s reporting of software corrections identified as
15 Code 1 (at 125,661 units), Code 2 (at (79,892) units), and Code J (at 30,897 units). These
16 software correction codes do not refer to physical units but, rather are used to plug the
17 difference between actual physical units and the virtual or electronic accounting of units.
18 Williams says Software Code Adjustments are extremely complicated and are not
19 susceptible for use in calculating Debtor’s inventory units.

20 On October 17, 2013, Debtor changed its choice on how its inventory was to be
21 Removed by Amazon. Prior to that date, Amazon automatically returned unsellable units
22 to Debtor so long as the unit was not damaged in Amazon’s warehouse. After October 17,
23 2013, Debtor had to manually request that Amazon return such unsellable units to the
24 Debtor.²³⁸ Bachand testified that if Debtor did request that such units be returned to
25 Debtor, Amazon would destroy the unit 90 days after the unit was identified as
26 unsellable.²³⁹

27 ²³⁷ Ex. 5, page 73.

28 ²³⁸ February 18, 2021, Trial Transcript at 159:12 – 160:4. See also Ex. 245.

²³⁹ *Id.* at 160:5-8.

1 Although Debtor ceased its operations on January 31, 2014, Amazon either
2 destroyed, sent back to Debtor or continued to retain Debtor's units. Of the 19,850 units
3 removed after January 31, 2014, 9,500 were sellable as of January 31, 2014. A total of
4 19,890 units were Removed (destroyed or shipped back to Debtor) after January 31, 2014,
5 12,107 units were shipped to Debtor, and 7,783 units were destroyed.²⁴⁰ Additionally, as
6 of March 2015, the M15 Data showed Amazon continued to retain 20,405²⁴¹ units. No
7 evidence was presented to indicate whether, after March 2015, Amazon returned these
8 units to Debtor, destroyed the units, or otherwise compensated Debtor for those units.²⁴²

9 Code D (destroyed units) could be destroyed as unsellable units due to Amazon's
10 fault (Code E) or at Debtor's responsibility (Code Q) so Code D is not a fair Adjustment
11 to lay off on Amazon alone.²⁴³

12 Williams was not subjected to re-direct examination by Amazon's counsel.

13
14 3. Timothy Shaffer

15 (Defendant introduced Shaffer's direct testimony by designating portions of his
16 depositions from April 24, 2019, and July 3, 2019.)

17 Shaffer was designated as a Fed. R. Civ. P. 30(b)(6) witness for Debtor in the July
18 deposition.

19 In his Rule 30(b)(6) Deposition, Shaffer testified about Debtor stabilizing its
20 revenues after he became Trustee. Shaffer also reviewed the automatic stay violation
21 damages in Morones' Damages Report. Shaffer acknowledged Morones' Damages Report
22 stated the automatic stay violation period was 21 days while the Complaint alleged 14
23 days. However, Shaffer was unable to testify as to which timeframe was accurate. Shaffer
24 was also unable to testify as to Morones' source in stating lost profits calculations

25
26 ²⁴⁰ DE 310, Williams Declaration of December 21, 2020.

27 ²⁴¹ DE 310, page 3, ¶ 12.

28 ²⁴² The Debtor could not, of course, have made a request to Remove these units because this data was not produced to the Trustee until his lawyers received the M15 Data, two years after the commencement of this Adversary Proceeding.

²⁴³ See Ex. 5, page 73, Code D line.

1 extended to 21 days. Schaffer stated that his personal damage calculation for the stay
2 violation would have been higher but acknowledged Morones' estimate was reliable.

3 In his April deposition, Shaffer discussed Bellino's involvement in the bankruptcy
4 proceeding and his expectations that Bellino would continue operating the business and
5 carry out any directives requested by him. Shaffer testified that Bellino seemed
6 straightforward, honest, and provided accurate information to him. Shaffer also testified
7 about his limited relationship with Lawcock during the Debtor's bankruptcy.

8 At his April deposition, Shaffer reviewed the Complaint and tried to explain the
9 basis of his allegations, including allegations as to why or how Amazon failed to account
10 for inventory worth more than \$1.5 million. Shaffer further discussed his understanding
11 of what led Debtor to file for bankruptcy and noted there were lots of unanswered
12 questions about Debtor's inventory. Ultimately, Shaffer believed Debtor's inability to
13 rectify inventory issues led to significant working capital restraints. Schaffer also
14 discussed Debtor's consignment program through the FBA Program post-bankruptcy.
15 The consignment program addressed Debtor's issue with getting products and the
16 vendors' worries about not getting paid once their product was sold. Under the
17 consignment program, a vendor's product remained property of a vendor while that
18 property was in Amazon's fulfillment center. Shaffer also discussed Debtor's inventory
19 control systems prior to filing bankruptcy and explained Debtor relied mostly on Seller
20 Central Data for information. After bankruptcy, however, Schaffer testified Debtor tried
21 to internally implement better practices to track its inventory. Finally, Shaffer reviewed
22 various Reimbursement claims submitted to Amazon by Bellino and Lawcock and
23 discussed the reason and process for submitting the claims.

24
25 4. Justin Ice

26 (Defendant introduced Ice's direct examination through designations from his
27 deposition conducted on July 28, 2107.)
28

1 Ice was hired by Amazon as an Investigation Specialist in 2013. In response to a
2 seller's request, Ice would research Amazon's databases for information. Ice testified that
3 he was frequently selected to conduct intensive reviews of high-volume sellers, including
4 Debtor.

5 Ice testified about Code M, which indicates a product is missing. A Code M
6 automatically starts a 30-day timer. Unless the inventory is offset by a Code F, Amazon
7 will issue a reimbursement within 30 days. If the reimbursement is of high value, upper-
8 level management will review the reimbursement before it is processed. Ice also testified
9 about how Amazon's reimbursement liability can be offset by a Code N. A Code N is
10 used when inventory, previously found and placed in an Amazon holding account, is
11 transferred to the seller's account as a replacement for the missing product. A product is
12 placed in the Amazon holding account when Amazon's ownership determination engine
13 cannot identify where a product belongs.

14 Ice further testified about the Deep Dive and reconciliation process he and
15 Francisco Quintana performed. The Deep Dive was an attempt to look at Debtor's top 100
16 ASIN's, review their accuracy, and determine trending issues. Ice testified that he believed
17 the range selected was statistically relevant in terms of valuation and how it impacted
18 Amazon's potential liability. However, he ended up looking at more than just 100 ASIN's.

19 Ice also detailed what all that went into the Deep Dive. The crux of the Deep Dive
20 involved tracking the potential changes or shifts in identifiers and seeing how many
21 different identifiers existed. Ice explained the importance of knowing all the identifiers
22 associated with a product to look at a product from a reconciliation standpoint. Ice
23 testified that Debtor had multiple FNSKUs and MSKUs tied to a single ASIN, and it was
24 apparent Debtor created multiple identifiers for either the same item or items which were
25 merged into the same ASIN. Once Ice had collected all the identifiers, step 2 involved
26 putting the data together and looking for things that did not make sense. Ice primarily
27 relied on Seller Central Data and other tools that allowed him to track ASIN movement.

28

1 During this process, Ice noticed Debtor's claim overlooked information in Seller Central
2 Data, including reimbursements that occurred on order IDs.

3 Ice also testified about Debtor's claim that was submitted to Amazon. Ice
4 acknowledged that he knew Flores worked on the claim. Ice reiterated Flores' conclusions
5 that the claim was conducive to errors and potentially offsetting or compensating events
6 were not being used to resolve discrepancies across inventory items. Ice clarified that he
7 never made conclusions about where Debtor's data supporting its claim came from but
8 was mostly concerned with checking the data's validity.

9
10 5. Jeff Moore

11 (Defendant introduced Moore's direct testimony by designating portions of his
12 depositions from December 5, 2017.)

13 Moore was designated as a Fed. R. Civ. P. 30(b)(6) witness for Amazon. During
14 his deposition, Moore provided general background information on the FBA Program.
15 Moore also testified about the differences between Amazon's distribution centers and
16 Amazon's fulfillment centers and discussed Amazon's inventory processes. Once a
17 shipment arrived at an Amazon fulfillment center, Amazon associates (employees) would
18 count items one by one and place them into a tote or cart. A tote is a plastic bin Amazon
19 used to transport products to their designated shelf, where another associate would store
20 the products. At the time products are counted associates are also to inspect for damage.
21 If a product is damaged, the product is placed into a damaged tote. If the product arrived
22 damaged, the product would be placed in the seller's inventory and the seller could have
23 the product Removed. Moore next explained Amazon's Inventory Reconciliation formula,
24 which helped sellers understand how much inventory they had on hand. Moore also
25 explained that between 2008 and 2013 Debtor could check the inventory it had at an
26 Amazon fulfillment center at any given time under a website link in Seller Central called
27 Manage Your Inventory.

1 Moore explained how Amazon allocates inventory events or damages among
2 commingled products. Based on his recollection, Moore believed only one seller's
3 inventory would be in a tote at a time if products in the tote were commingled. Moore
4 further explained how Amazon could ship another seller's product to fulfill a customer
5 order so long as the product was the same as the seller whose product was sold. The seller
6 whose inventory made the sale would be reduced, and the seller whose product was
7 shipped would be credited a unit.

8 Moore further discussed how Amazon processes Reimbursements if a customer
9 returns a product. When a customer returns a product, Amazon will run questionnaires
10 and determine who is at fault for the return—the Debtor or Amazon. If Amazon is at fault,
11 a Reimbursement is issued to Debtor, which is typically the sales price minus Amazon's
12 fees associated with the transaction. Moore also explained what happens when a product
13 is not sold because of damage caused by Amazon. Amazon uses an Inventory Valuation
14 System that searches a product's sale history to determine what the
15 replacement/reimbursement value is. Lastly, Moore discussed Code M and how Amazon
16 has an obligation to reimburse Debtor typically within 30-days for missing products.

17
18 6. Eric Soder

19 (Defendant introduced Soder's direct examination through designations from his
20 deposition conducted on July 27, 2017.)

21 Soder was a Product Manager for Amazon in 2009. Soder testified about Amazon's
22 fulfillment center processes in 2009. When a package arrived at the Amazon fulfillment
23 center it was placed on the receiver line. Next, an associate would look for a label
24 identifying the seller and a unit barcode identifying the number of units in the shipment.
25 The associate would ensure the seller and unit count matched the virtual shipment
26 notification already in Amazon's system. If Amazon's system did not recognize the
27 shipment, the shipment was flagged for a "problem solve" and set aside. Once a product
28 was successfully "checked-in," it was placed in a tote or on a designated shelf.

1 Soder testified about how and when missing codes and found codes were assigned.
2 A Code M is typically assigned when units are cycle-counted, and a product is missing
3 from its designated location. A Code F is only assigned if a problem-solving agent is
4 unable to figure out where the missing unit came from. Whether a product gets a Code M
5 or Code F, it is assigned a damaged adjustment code, which is reported in Seller Central.
6 To determine what specific code should be assigned, a problem solver would offer
7 different inputs into Amazon's system. Based on the summation of inputs, Amazon's
8 system would determine the specific code. Soder also explained the hierarchy of Amazon
9 warehouse employees. The basic pyramid structure, starting from the bottom, included
10 receivers, pickers, packers, and problem-solving agents. Receivers simply received the
11 shipments as they arrived and performed the check-in process. Pickers would search and
12 find inventory when it was requested for removal. Packers packed inventory for shipment,
13 and problem-solving agents evaluated inventory if there were issues.

14 Lastly, Soder testified about his time visiting Debtor in Phoenix and Debtor's
15 operations. Soder went to Phoenix because Debtor was experiencing listing errors,
16 meaning Debtor had products in Amazon's fulfillment center that were not offered on the
17 amazon.com for sale. Soder believes Debtor experienced listing errors because it would
18 create an inbound shipment for Amazon to fulfill, send the inventory to Amazon, but then
19 change the inventory back to merchant fulfilled and ship the product from Debtor's
20 warehouse. Soder testified about other issues Debtor faced, like products not showing as
21 listed on Amazon's website and a product's ASIN listed on Amazon's website resulting
22 in a 404-page error. Soder also stated Debtor had issues with listing the same product at
23 different price points and struggled to have inventory returned to Debtor's warehouse.
24 Soder testified that he thought Debtor's overall operations were unorganized and that there
25 was internal confusion.

1 7. Jeffrey Cone

2 (Defendant introduced Cone's direct examination through designations from his
3 deposition conducted on August 17, 2020.)

4 Cone testified regarding the scope of his engagement with Morones and his
5 analysis, which informed Morones' Damages Report. Specifically, Cone took data from
6 different Seller Central Data, including Inventory Activity Reports and Inventory Status
7 Reports, and imported the data into database tables to prepare summaries. However,
8 Cone's summaries were not the basis of Morones' Damages Report. Cone also testified
9 regarding the software programs he created to process the Excel file settlement data.
10 Although he preserved the codes that the software program relied on, he did not preserve
11 the software in a way in which Amazon could run it.

12 Cone gave detailed testimony on information he relied on in his analysis and
13 information he used for general background knowledge. For his analysis, Morones
14 instructed Cone to focus only on the M15 Data and Seller Central Data. However, he did
15 incorporate information from Amazon's Amended Responses and Objections to the
16 Trustee's third set of discovery request and Amazon's adjustment reason codes, which
17 explains how Amazon defines the M15 Data adjustment codes. Cone also clarified he used
18 all raw data for his analysis and not Ashworth's analysis. Because Cone could not get a
19 clear understanding from Ashworth on how he reached his conclusions, Cone used Power
20 Builder to reverse engineer Ashworth's work back to the original data source. Cone's
21 reverse engineering process was not reflected in Morones' Damages Report.

22 Cone further testified in detail about Settlement Reports he reviewed from 2003
23 through 2013 and confirmed he tested the Settlement Reports for completeness at some
24 point in 2018. This is how he noticed gaps in time where nothing was reported. Cone
25 acknowledged that the gaps (Data Gaps) in the Settlement Reports were not disclosed in
26 Morones' Damages Report but confirmed he did notify Morones about the gaps. Cone
27 testified no one looked for the missing information because they were previously told they
28 had all the data that was available. Thus, Cone treated the gaps in his analysis as if Debtor

1 did not receive any cash from Amazon during those periods. Although Cone testified he
2 reviewed one of Debtor's bank deposit statements and it matched cash transfers in the
3 Settlement Report for that period, Cone claimed Debtor's bank statements were
4 unavailable for the periods of the Data Gaps.

5
6 8. Stephen Ashworth

7 (Defendant introduced Ashworth's direct examination through designations from
8 his deposition conducted on August 19, 2020.)

9 Ashworth is a technology consultant and the owner of Ashworth Consulting, LLC.
10 Ashworth was originally engaged by the Trustee to assist in the preservation of Debtor's
11 2013 records. Ashworth discussed how he preserved the Debtor's records, and how he
12 used a cloning tool to convert Debtor's PCs into VHDs.²⁴⁴ Ashworth testified that he
13 believed, "electronic-record wise," all Debtor's records were preserved. He also
14 confirmed he personally oversaw the collection of Debtor's PCs.

15 Ashworth explained what he accessed and downloaded from Seller Central
16 including Settlement Reports, Inventory Event Detail Reports, Inventory Transaction
17 Reports, and Monthly Ending Inventory Reports. The purpose of searching Seller Central
18 was to track the final disposition of Debtor's 6.5 million product units which were
19 submitted to Amazon.

20 Ashworth specifically testified about the Settlement Data in Seller Central. He was
21 unable to retrieve the Settlement Data prior to January 2012 because Seller Central only
22 had a 2-year look-back time limit. However, a former Amazon employee, Dewberry,
23 instructed Debtor towards the end of 2011 and before Debtor's full audit to download the
24 Settlement Data from before 2012. Ashworth testified that he did notice gaps in the
25 Settlement Data the Debtor's employees downloaded and was told the gaps occurred
26 because of problems with Seller Central timing out. He informed Morones and Cone of
27 the gaps (the Data Gaps).

28 ²⁴⁴ Defined in Attachment 1 as Virtual Hard Drives.

1 Lastly, Ashworth testified about his initial engagement with the Trustee, whether
2 he knew he would possibly be called as a testifying expert, as well as his relationship with
3 Morones and Cone. Ashworth acknowledged that he thought he might provide expert
4 testimony about inventory claims. However, once Morones became more involved,
5 Ashworth became more of a secondary expert.

6
7 9. Thomas Reilly

8 (Defendant introduced Reilly's direct testimony by designating portions of his
9 deposition from May 1, 2019.)

10 Reilly was a former employee of Debtor and testified about his professional
11 relationship with Bellino and Debtor's operations. Reilly formed a professional
12 relationship with Bellino while working at United Natural Foods and Lone Star
13 Distribution. Bellino and Reilly's professional relationship led to Reilly working for
14 Debtor. After six to nine months of working for Bellino, Reilly quit working for Debtor.
15 Reilly explained that he quit for multiple reasons, including his unhappiness with Debtor's
16 business practices. Reilly also testified that Bellino's integrity played a role in his decision
17 to leave Debtor. Reilly could not recall the specific point and time he started questioning
18 Bellino's integrity and business choices.

19 Reilly testified about Debtor's general operations and practices while he worked
20 there. Regarding Debtor's inventory tracking system, Reilly stated Debtor's tracking was
21 "not what [he] thought it would be" and it was "extremely low quality." Further, Reilly
22 testified that there seemed to be a disconnect between the buyers managing the inventory
23 in Seller Central and the warehouse team managing the physical inventory in the building.
24 Reilly further testified about Amazon's FBA Program at the time he worked with Debtor,
25 which FBA Program was still evolving. Reilly testified Amazon reached out to Debtor
26 and helped Debtor get set up with the FBA Program.

27 During his deposition, Reilly reviewed the Debtor's Disclosure Statement and
28 disagreed/agreed with certain statements. Reilly disagreed with the statement that Debtor

1 “changed its operating model from an Amazon fulfillment method to . . . merchant self-
2 fulfillment.” He recalls while he was working for Debtor, the Debtor only shipped smaller,
3 lighter items through the Merchant Program. However, Reilly agreed with statements
4 blaming Debtor’s inventory tracking and internal processes for causing difficulty.

5 Lastly, Reilly testified about Debtor selling expired products and how Bellino
6 would sell products below Debtor’s cost because he wanted to win the “buy box.” By
7 clicking the “buy box,” a customer automatically purchases from the seller with the
8 cheapest price. Furthermore, Reilly described issues the Debtor had with tracking its
9 products because employees would create new listings on Amazon without creating the
10 item information in OMX, Debtor’s inventory tracking system.

11
12 10. Sean Lawcock

13 (Defendant introduced Lawcock’s direct testimony by designating portions of his
14 deposition from April 23, 2019.)

15 As part of his deposition, Lawcock testified Debtor did not entirely transition its
16 operating model in 2010 from the FBA Program to the Merchant Program. Lawcock
17 explained that under the Merchant Program, Debtor kept low inventory on the shelf
18 because it could get most items directly from the merchants and still get orders out on
19 time, rendering high volumes of inventory pointless. Because of this policy, Debtor did
20 not have a procedure in place to keep track of products in its warehouse. Lawcock
21 described the Debtor’s storing and tracking process of products in the warehouse as a
22 “quick visual,” meaning a walk through the stored items would easily show what was
23 available and what needed to be ordered.

24 Debtor also did not track its sold inventory through the FBA Program prior to
25 bankruptcy because the Debtor had faith in Amazon’s tracking systems. However, Debtor
26 did use Seller Central Data to view the amount of inventory in Amazon’s fulfillment
27 centers, what was available for sale, and the amount of inventory inbound to Amazon.
28 Lawcock testified that he was not sure Debtor recorded any information Amazon provided

1 to Debtor. However, he maintained his own records through Microsoft Excel from 2010
2 through 2011. After filing bankruptcy, Debtor created its own internal audit processes for
3 tracking inventory.

4 During his deposition, Lawcock testified about an email chain between Soder,
5 Reilly, and himself with the subject line "Item Not In Catalog" regarding a 404 error
6 message. In one email response, Soder explained the reason for the 404 error was because
7 Debtor had "2 new SKUs mapped to the new ASIN." Lawcock explained that this
8 sometimes occurred when Amazon would merge two ASIN listings that seemed to be the
9 same product ASIN Merge. The result of the ASIN Merge was multiple SKUs being
10 assigned to the same ASIN, which impacted Debtor's ability to track inventory.
11 Responding to Soder's email, Lawcock recommend that one of the SKUs be deleted.
12 However, Lawcock clarified in his deposition that a SKU could never be deleted.

13 Lawcock also testified about other situations that made Debtor's ability to track its
14 inventory difficult. For example, Amazon incorrectly formatted SKUs and there were
15 "Dot Missing SKUs." A "Dot Missing SKU" happened when Amazon would just choose
16 a SKU for inventory it received if it did not know which SKU it belonged to. Without
17 reaching out to Amazon, Debtor could not track its inventory because it was uncertain
18 what was listed on the "Dot Missing SKU."

19
20 11. Daniel A. Bellino

21 (Defendant introduced Bellino's direct testimony by designating portions of his
22 deposition from April 22, 2019.)

23 Bellino was an owner and founder of the Debtor. Bellino testified about the
24 beginnings of Debtor's operations in 2006 and what led the Debtor to file for bankruptcy.
25 When the Debtor first used the FBA Program in 2007, Amazon's reporting and data
26 generation capabilities were limited. However, Amazon's reporting improved over time.
27 Bellino also testified about Debtor's process for shipping products to Amazon. The Debtor
28 would receive products from distributors, label the products with printed stickers provided

1 by Amazon, and ship the product to Amazon. Bellino further discussed Debtor's
2 consignment program process, where vendors would ship the product directly to Amazon,
3 rather than Debtor.

4 A large portion of Bellino's deposition was dedicated to discussing his
5 understanding of Debtor's operations, the FBA Program, Amazon's processes, and
6 tracking inventory through Seller Central. Debtor relied on Seller Central Data and an
7 internal SQL program to track inventory. Bellino explained the roles Lawcock, Reilly,
8 Peeples, and Schmidt played in managing Debtor's operations. Bellino also discussed the
9 Debtor's process for managing Aged Inventory, which is inventory that has not been sold
10 within 90 days. Debtor had different processes for managing Aged Inventory under the
11 FBA Program and the Merchant Program. Under the FBA Program, Debtor would try to
12 either lower the price or call it back for a return. Bellino further testified about Debtor's
13 reorganization process and the steps Debtor took to improve its operations, like
14 restructuring management to be more efficient. Debtor also hired SP Express, a third-party
15 company, to outsource its supplier receiving and product shipment process to Amazon.

16 During his Deposition, Bellino reviewed multiple emails between Bellino and
17 Debtor's other managers and emails from Amazon. The emails regarded Debtor's
18 operations through the FBA Program and primarily pertained to issues with inventory.
19 However, Bellino did not remember any of the email communications and could not
20 answer substantive questions. Bellino also reviewed multiple documents related to
21 Debtor's bankruptcy and operations during the deposition and, similarly, could not
22 remember anything of substantive value.

23 24 **E. Post-Trial Proceedings**

25 Post-trial briefs were submitted by the Trustee on issues concerning burden of
26 proof²⁴⁵ and pre-judgment interest.²⁴⁶ Amazon filed its briefs on the burden of proof

27
28 ²⁴⁵ DE 370.

²⁴⁶ DE 371.

1 issues²⁴⁷ and pre-judgment interest issues.²⁴⁸ Oral argument on these briefs was conducted
2 on April 19, 2021, after which this matter was taken under advisement.

3
4 **F. Tentative Under Advisement Order**

5 On September 30, 2021, this Court issued its Tentative Under Advisement
6 Order²⁴⁹ and invited the parties “to supply their criticisms, corrections, and comments no
7 later than October 29, 2021.

8 The Court assumed both parties would find fault with the Court’s Tentative
9 Under Advisement Order. The parties did not disappoint.

10 By stipulation of the parties²⁵⁰ comments were required by January 12, 2022, and
11 responses by February 9, 2022. Oral argument was rescheduled.²⁵¹ The Trustee’s
12 comments were timely filed²⁵² as were Amazon’s.²⁵³ Amazon’s response²⁵⁴ and
13 Trustee’s reply²⁵⁵ were also timely filed. Oral argument was held via Zoom.gov on
14 February 24, 2022, after which the Court again took this matter under advisement.

15
16 **VII. ANALYSIS OF TRUSTEE’S CAUSES OF ACTION**

17 **A. Count 1: Failure to Turnover Estate Property Pursuant to § 542(a)**

18 **1. Legal Analysis**

19 Section 542(a) states:

20 Except as provided in subsection (c) or (d) of this section, an entity, other
21 than a custodian, in possession, custody, or control, during the case, of
22 property that the trustee may use, sell, or lease under section 363 of this
23 title, or that the debtor may exempt under section 522 of this title, shall
24 deliver to the trustee, and account for, such property or the value of such

24 ²⁴⁷ DE 376.

25 ²⁴⁸ DEs 371 and 383.

26 ²⁴⁹ DE 390.

27 ²⁵⁰ DE 391.

28 ²⁵¹ DE 394.

²⁵² DE 396.

²⁵³ DE 397.

²⁵⁴ DE 398.

²⁵⁵ DE 399.

property, unless such property is of inconsequential value or benefit to the estate.

The United States Supreme Court held that turnover was appropriate only “when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof, by the defendant at the time of the [turnover] proceeding.”²⁵⁶ § 542(a) does not have a “present possession” requirement.²⁵⁷

Plaintiff’s turnover claim rises or falls with Plaintiff’s Count 3 breach of contract claim. If Plaintiff’s breach of contract claim is not proven, there would be nothing for Defendant to turnover to Plaintiff.

2. Conclusion on Turnover Claims

Plaintiff’s turnover cause of action is closely intertwined with Plaintiff’s Count 3 breach of contract claim. These two causes of action will be discussed together in the breach of contract section below.

B. Count 2: Violation of the Automatic Stay Pursuant to § 362

1. Legal Analysis

Under the Bankruptcy Code, “[a]n individual injured by any willful violation of a stay ... shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages.”²⁵⁸ While a corporate entity can be a person, it cannot be an individual for purposes of § 362 because “individual” is not synonymous with “person” under relevant provisions of the Bankruptcy Code.²⁵⁹ Nonetheless, a corporation may be entitled to recovery for a stay violation under § 105(a)

²⁵⁶ *Maggio v. Zeitz*, 333 U.S. 56, 63–64, 68 S. Ct. 401, 405 (1948).

²⁵⁷ *In re Newman*, 487 B.R. 193, 201 (B.A.P. 9th Cir. 2013).

²⁵⁸ § 362(k)(1).

²⁵⁹ *Johnston Environmental Corp. v. Knight (In re Goodman)*, 991 F.2d 613 (9th Cir. 1993). *See also In re Chateaugay Corp.*, 920 F.2d 183 (2d Cir. 1990) (Corporation could not recover compensatory damages for creditor's willful violation of automatic stay; Bankruptcy Code provision authorizing award of damages was applicable only to natural persons).

1 as a sanction for civil contempt.²⁶⁰ Under § 105(a), the Court may impose civil sanctions
2 *sua sponte* for a stay violation.²⁶¹

3 Generally, monetary civil sanctions are imposed to either compensate the
4 complainant for their losses caused by the contemptuous conduct or to coerce the
5 contemnor's compliance with a court order.²⁶² When the purpose of sanctions is
6 compensatory, a fine, payable to the complainant, must be based on evidence of actual
7 loss.²⁶³

8 The Trustee need not prove by a preponderance of the evidence that Amazon's
9 actions caused a specific amount of damages or lost profits. It need only show Amazon's
10 actions caused the Debtor to lose profits.²⁶⁴ Here, Amazon "should not profit from the
11 difficulty in proving exact damages."²⁶⁵

12 Plaintiff is not required to prove Debtor's lost profits with "mathematical
13 certainty."²⁶⁶ Rather, Plaintiff must demonstrate lost profits with reasonable certainty, in
14 other words the "existence of damages must be taken out of the realm of speculation."²⁶⁷
15 Moreover, Plaintiff is not required to prove that Amazon's stay violation was the exclusive
16 cause of Debtor's lost profits. Rather, in proving Debtor's lost profits, "all that is required
17 is a probability" that Amazon's actions caused Debtor's loss.²⁶⁸

18 At a hearing on April 26, 2013, the Court found Amazon willfully violated the
19 automatic stay.²⁶⁹ At trial, the Court heard evidence from the Trustee and Azzarelli about

20
21 ²⁶⁰ *In re H Granados Commc'ns, Inc.*, 503 B.R. 726, 733 (B.A.P. 9th Cir. 2013) (Citing *Johnston Envtl. Corp. v.*
Knight (In re Goodman), 991 F.2d 613, 620 (9th Cir. 1993)). See also *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir.

22 ²⁶¹ § 105(a) ("No provision of this title providing for the raising of an issue by a party in interest shall be construed
23 to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to
enforce or implement court orders or rules, or to prevent an abuse of process.").

24 ²⁶² *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829, 114 S. Ct. 2552, 2558 (1994).

25 ²⁶³ *U.S. v. United Mine Workers of America*, 330 U.S. 258, 303, 67 S. Ct. 677, 701 (1947).

26 ²⁶⁴ *HSS Enters., LLC v. Amco Ins. Co.*, 2008 WL 1787127, at *13 (W.D. Wash. Apr. 16, 2008).

27 ²⁶⁵ *Milgard Tempering, Inc. v Selas Corp. of America*, 902 F.2d 703, 710 (9th Cir. 1990).

28 ²⁶⁶ *In re Visser*, 660 Fed. Appx. 553, 538 (9th Cir. 2016) quoting the Idaho Supreme Court case of *Trilogy Network*
Systems, Inc. v Johnson, 172 P.3d 1119, 1121 (2007). This Court presumes the 9th Circuit cites to the Idaho Court
in general approval of this proposition as well as the proposition referenced in the next footnote below.

²⁶⁷ *Id.* Quoting the Idaho Court in the case of *Anderson & Nafziger v GT Newcomb, Inc.*, 595 P.2d 709-716 (1979).

²⁶⁸ *Ranger Enterprises, Inc. v Leen & Associates*, 1998 WL 668380 at *2 (9th Cir. Sept 21, 1998).

²⁶⁹ Admin DE 262.

1 the fallout that occurred following the 15 days in April 2013 where Amazon violated the
2 stay by denying Debtor access to its only sales outlet, namely the amazon.com online
3 platform. Even after this Court ordered Amazon to open its platform to Debtor, Debtor's
4 sales never recovered or even came close to pre-stay violation levels.²⁷⁰ Moreover,
5 Debtor's vendors and Plan supporters were "spooked" by Amazon's actions and Debtor's
6 vulnerability to the actions of Amazon, Debtor's sole online access provider. Debtor had
7 no other platform where it could sell its products besides amazon.com.

8 This Court finds that reviewing testimony by Azzarelli and the Trustee as well as
9 reviewing the Debtor's monthly operating reports²⁷¹ and Morones' Damages Report
10 reveals that Amazon's stay violations did cause Debtor to lose significant profits. Even if
11 other market factors were at play in Debtor's business between April 2015 and October
12 21, 2015, this Court finds Amazon's stay violation was far and away the precipitating
13 cause of Debtor's lost profits. Evidence of Debtor's track record of profitability and
14 precipitous decrease in profitability during and after Amazon's stay violations support this
15 Court's conclusions. Amazon suggests other factors created headwinds against Debtor's
16 financial performance but has not persuaded this Court that such challenges were either
17 material or should reduce Debtor's lost profits in any event.

18 Amazon's stay violation not only denied Debtor's ability to sell products from
19 April 11 through April 26, 2013,²⁷² but Debtor's sales were dramatically diminished
20 thereafter until October 22, 2013, when Amazon once and for all shut down Debtor's
21 access to its platform. Williams calculated Debtor's stay violation damages only in the
22 month of the stay violation. The Court rejects this approach as Debtor's damages caused
23 by Amazon's violation of the stay extended through to the date Amazon terminated
24 Debtor's access to Amazon's online platform. The Court finds Amazon is liable to Debtor

25
26
27 ²⁷⁰ See Ex. 7, Table 6a.

28 ²⁷¹ See Trial Ex. 160 as well as the Debtor's monthly operating reports for July 2012 (Admin DE 179), August 2012 (Admin DE 180), September 2012 (Admin DE 198), and October 2012 (Admin DE 199).

²⁷² DE 332, page 16, ¶ 20.

1 for the contribution margin on Debtor's reduced sales from April 11, 2013 to October 22,
2 2013.

3 While cross-examination also revealed that some of Debtor's sales may have been
4 of products which Amazon prohibited to be sold on its platform, the Court will not reduce
5 Plaintiff's stay violation damages due to those sales because, prohibited by Amazon or
6 not, those sales were a part of Debtor's revenues and those revenues dropped precipitously
7 when Amazon wrongfully denied Debtor access to Amazon's platform for 15 days in April
8 2013. The fact that Debtor also reduced sales prices of some of its products from April
9 2013 to October 2013 does not aid Amazon's defense to the stay violation damages.
10 Debtor's reduced prices highlight Debtor's desperate cash flow predicament occasioned
11 by Amazon's stay violation. Amazon may not now profit by reducing Debtor's stay
12 violation damages by the difference between (1) what those units would ordinarily sell for
13 and (2) what those units sold for during this April to October 2013 cash crisis caused by
14 Amazon.

15 Morones testified that the stay violation damages suffered by Debtor should be
16 measured by expected revenues from April 2013 through October 22, 2013, multiplied by
17 a 9.7% contribution margin less the actual contribution margin realized by Debtor during
18 this time frame. Morones gauged expected revenues by using average monthly sales from
19 November 2012 through March 2013²⁷³ to which she then added a 0.2% expected monthly
20 sales growth. The April 2013 expected revenue number was \$1,591,877²⁷⁴ but every
21 month thereafter Morones increases expected revenue by the 0.2% projected sales growth.

22 This Court discerns two flaws in Morones' projected revenue numbers. First, the
23 Court finds Morones' 0.2% projected sales growth was not supported by the data
24 regarding Debtor's sales from July 2012 to March 2014. The Court will not apply a
25 growth factor to the revenue projections from May through October 2013. Second, the
26 Trustee testified that Debtor's revenues were stabilized beginning in July 2012. Morones

27 ²⁷³ Exhibit 240. Here, Amazon's counsel tells Morones to use November – March 2013 numbers for stabilized gross
28 income.

²⁷⁴ Ex 7, Tables 6 and 6A contain Morones' calculations of Debtor's stay violation damages.

1 should have used average monthly sales from July 2012 through March 2013, not
2 November 2012 through March 2013. This produces an average gross monthly sales
3 amount of \$1,495,357 over this nine-month period, not the \$1,591,877 amount used by
4 Morones to project April 2013 sales.²⁷⁵ Using this nine-month period also produces a
5 9.8% contribution margin percentage.

6 Applying the margin of 9.8% to the stabilized monthly gross sale number of
7 \$1,495,357 produces a contribution margin of \$147,165 per month. From this, the actual
8 contribution margin must be subtracted, and the month of October 2013 must be prorated.
9 The Court's calculations produce total lost profits of \$668,484.²⁷⁶

10 11 2. Conclusion on the Stay Violation Claims

12 Amazon is liable to Plaintiff for loss profit damages of \$668,484 plus interest from
13 the date of judgment, until paid, at the federal rate.²⁷⁷

14 15 **C. Count 3: Breach of Contract**

16 1. Legal Analysis

17 The Parties' Contract specifies application of Washington law in the event of a
18 dispute.²⁷⁸ Under Washington law, a breach of contract is actionable only if the contract
19 imposes a duty, the duty is breached, and the breach proximately causes damage to the
20 claimant.²⁷⁹ The Trustee asserts in Count 3 of the Complaint that Amazon breached the
21 FBA Agreement by: (1) not sending a Notice of Material Default to the Debtor before
22 terminating the FBA Agreement, as required by the terms of the FBA Agreement; (2)
23 improperly and wrongfully purporting to terminate the FBA Agreement and denying the
24 Debtor access to the Amazon Platform; and (3) failing to store, maintain, preserve, and

25
26 ²⁷⁵ See Attachment 7 to this Order.

²⁷⁶ The aggregate monthly lost profits from May 2013 through October 22, 2013. See Attachment 8.

27 ²⁷⁷ See 28 U.S.C. § 1961.

²⁷⁸ Ex 1 at PDF page 10 of 38.

28 ²⁷⁹ *C 1031 Props., Inc. v. First Am. Title Ins.*, 301 P.3d 500, 502 (Wash. Ct. App. 2013) (quoting *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 899 P.2d 6, 9 (Wash. Ct. App. 1995)).

1 account for the Debtor's inventory and failing to compensate the Debtor for "Lost
2 Inventory."²⁸⁰

3 4 2. Burden of Proof

5 Under Washington law, the claimant must prove damages with reasonable
6 certainty, meaning by a preponderance of the evidence.²⁸¹ The "doctrine respecting the
7 matter of certainty, properly applied, is concerned more with the fact of damage than with
8 the extent or amount of damage."²⁸² Once the claimant establishes the fact of loss with
9 certainty, uncertainty regarding the amount of loss will not prevent recovery.²⁸³ Thus, a
10 plaintiff "will not be required to prove an exact amount of damages, and recovery will not
11 be denied because damages are difficult to ascertain... Generally, whether the plaintiff
12 has proved his loss with sufficient certainty is a question of fact."²⁸⁴ Any doubts about
13 certainty are generally resolved against the party who breached the contract.²⁸⁵

14 Although the exact amount of damages need not be shown with mathematical
15 certainty, a claimant must come forward with sufficient evidence to support a damages
16 award.²⁸⁶ Evidence of damages "is sufficient if it affords a reasonable basis for estimating
17 loss and does not subject the trier of fact to mere speculation or conjecture."²⁸⁷ The
18 damages must be susceptible of ascertainment in some manner and by reference to some
19 definite standard, such as "*market value, established experience, or direct inference from*

20
21 ²⁸⁰ DE 1, ¶¶ 39–47.

22 ²⁸¹ *Greensun Grp., LLC v. City of Bellevue*, 436 P.3d 397, 409 (Wash. Ct. App. 2019); *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 845 P.2d 987, 990 (Wash. 1993).

23 ²⁸² *Columbia State Bank v. Invicta L. Grp. PLLC*, 402 P.3d 330, 342 (Wash. 2017) (quoting *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 257 P.2d 784 (Wash. 1953)).

24 ²⁸³ *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 315 P.3d 1143, 1150 (Wash. Ct. App. 2013) (quoting *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 845 P.2d 987, 990 (Wash. 1993)).

25 ²⁸⁴ *Id.*

26 ²⁸⁵ *Larsen v. Walton Plywood Co.*, 390 P.2d 677 (Wash. 1964), *adhered to*, 396 P.2d 879 (Wash. 1964); *Northwest Land & Inv., Inc. v. New West Federal Sav. and Loan Ass'n*, 786 P.2d 324 (Wash. Ct. App. 1990); Restatement (Second) of Contracts § 352, comment a. *See also Moore v. Health Care Auth.*, 332 P.3d 461, 468 (Wash. 2014), *en banc* (The breaching party bears "the risk of the uncertainty which his own wrong has created.").

27 ²⁸⁶ *Fed. Signal Corp. v. Safety Factors, Inc.*, 886 P.2d 172, 188 (Wash. 1994); *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 315 P.3d at 1150 (citing *O'Brien v. Larson*, 521 P.2d 228 (Wash. Ct. App. 1974)).

28 ²⁸⁷ *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 315 P.3d at 1150 (quoting *Clayton v. Wilson*, 227 P.3d 278 (Wash. 2010)).

known circumstances.”²⁸⁸ The factfinder does not commit speculation when, “once the fact of damage is established, it is permitted to make reasonable inferences based upon reasonably convincing evidence indicating the amount of damage.”²⁸⁹ On a challenge as to the sufficiency of evidence, “all evidence must be taken in the light most favorable to the plaintiff, and he is entitled to all reasonable inferences.”²⁹⁰ The amount of damages generally is a question of fact.²⁹¹

a) Burden Shifting

Generally, a plaintiff bears the burden of proving all elements of their claim.²⁹² A plaintiff establishing a *prima facie* case does not shift the burden of proof or require the defendant to prove the negative by a preponderance of the evidence.²⁹³ Instead, it merely requires the submission of the issue to the factfinder to determine the preponderance of the evidence.²⁹⁴ Additionally, a plaintiff’s lack of proof on a vital fact may not be cured by the defendant’s failure to prove the negative.²⁹⁵

Trustee asserts that once he has met his burden, the burden then shifts to Amazon to persuade the Court to the contrary with admissible evidence.²⁹⁶ Specifically, the Trustee asserts: (A) once the Trustee met its burden of proving inventory shrinkage through the inventory adjustment reports, the burden shifted to Amazon to disprove such;²⁹⁷ (B) for

²⁸⁸ *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 257 P.2d 784, 788 (Wash. 1953) (emphasis supplied) (quoting 15 AM. JUR., Damages, 414, § 23)).

²⁸⁹ *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 257 P.2d 784, 788–89 (Wash. 1953) (“Once such a *prima facie* showing is made, there is sufficient evidence in the record to permit reasonable inferences to be drawn therefrom as to the extent of damage.”).

²⁹⁰ *O’Brien v. Larson*, 521 P.2d 228, 231 (Wash. Ct. App. 1974) (citing *Couie v. Local 1849, United Brotherhood of Carpenters & Joiners of America*, 316 P.2d 473 (Wash. 1957)).

²⁹¹ *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 315 P.3d at 1150.

²⁹² *Cedar River Water & Sewer Dist. v. King Cnty.*, 315 P.3d 1065, 1073 (Wash. 2013).

²⁹³ *Gillingham v. Phelps*, 119 P.2d 914, 919 (Wash. 1941) (“[T]he burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case [,] he fails.”).

²⁹⁴ *Gillingham v. Phelps*, 119 P.2d 914, 919 (Wash. 1941).

²⁹⁵ *Emerick v. Bush*, 220 P.2d 340, 342 (Wash. 1950) (“The lack of affirmative proof of a vital fact may not be cured by the opposing litigant’s failure to prove the negative thereof.”).

²⁹⁶ DE 370, pg. 3, lines 11–13. *See also* pg. 6, lines 24–25, “Amazon had the burden to produce competent evidence to refute the trustee’s evidence.”

²⁹⁷ DE 370, pg. 10, lines 21–22

1 Amazon to avoid liability for Code Q units, Amazon had the burden to present admissible
2 evidence showing that Code Q units had not been damaged while being stored and its
3 failure to do so means Amazon is liable for them;²⁹⁸ (C) Amazon failed to meet its burden
4 showing Morones double-counted inventory under certain adjustment codes through the
5 use of Bachand's testimony and the demonstrative chart illustrating three hypothetical
6 scenarios;²⁹⁹ (D) Amazon failed to meet its burden to provide sufficient admissible
7 evidence supporting their maximum liability was limited to the loss of 36,792 units;³⁰⁰
8 and (E) Amazon failed to meet its burden to prove that some of the Debtor's inventory
9 fell into one of the four exceptions outlined in the FBA Reimbursement Policy that limit
10 Amazon's duty to pay.³⁰¹

11 If Amazon were raising an affirmative defense, then the burden-shifting and
12 preponderance of the evidence standard would be required.³⁰² However, Amazon is not
13 raising an affirmative defense; it merely argues the Trustee failed to meet its burden of
14 proof on the element of damages being shown by reasonable certainty and with sufficient
15 evidence.³⁰³ An affirmative defense is distinguishable from an attack on a plaintiff's case-
16 in-chief: "A defense which demonstrates that plaintiff has not met its burden of proof is
17 not an affirmative defense."³⁰⁴ Likewise, a defense that negates an element that a plaintiff
18
19
20

21 ²⁹⁸ DE 370, pg. 9, lines 6–8.

22 ²⁹⁹ DE 370, pg. 12–13.

23 ³⁰⁰ DE 370, pg. 13, lines 21–24.

24 ³⁰¹ DE 385, Trustee's Reply, pg. 1, lines 26–28, pg. 2, lines 1–8.

25 ³⁰² *Lake Hills Invs. LLC v. Rushforth Constr. Co., Inc.*, 472 P.3d 337, 344 (Wash. Ct. App. 2020), *review granted*, 481
26 P.3d 546 (Wash. 2021) (explaining a defendant bears the burden of proving an affirmative defense and that an
27 affirmative defense pleads matters extraneous to the plaintiff's *prima facie* case, which deny plaintiff's right to
28 recover even if all allegations set forth in the complaint are true) (first quoting *Erickson v. Biogen, Inc.*, 417 F. Supp.
3d 1369, 1386 (W.D. Wash. 2019); then citing *Fed. Deposit Ins. Corp. v. Main Hurdman*, 655 F. Supp. 259, 262
(E.D. Cal. 1987) ("[A]n affirmative defense puts the plaintiff on notice that matters extraneous to his *prima facie*
case are in issue and ordinarily allocates the burden of proof on the issue.")).

³⁰³ DE 376, Amazon's Response on Burden of Proof, pg. 2, lines 23–24, "The Trustee is trying to shift the burden of
proof because the evidence does not support his claims"

³⁰⁴ *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) (citing to *Flav-O-Rich v. Rawson Food
Service, Inc. (In re Rawson Food Service, Inc.)*, 846 F.2d 1343, 1349 (11th Cir. 1988)).

1 was required to prove is not an affirmative defense.³⁰⁵ Such defenses are merely rebuttal
2 against the evidence presented by the plaintiff.³⁰⁶

3 Trustee asserts Amazon was in possession of the inventory and had a duty to keep
4 track of that inventory. Because Amazon was in a better position to know and produce
5 facts concerning Debtor's inventory and what happened, Trustee controls the burden shifts
6 to Amazon.³⁰⁷

7 Plaintiff cites to the *King County* case for the proposition that a party in exclusive
8 control of damage evidence bears the shifting burden to disprove by a preponderance of
9 the evidence that Plaintiff has not been damaged. *King County* holds that when
10 information necessary to proof is "exclusively within the knowledge of one or the other
11 of the parties, the burden would be upon the party possessed of that knowledge to make
12 the proof."³⁰⁸ Exclusive means "shutting out all others from a part or share."³⁰⁹ Unlike
13 *King County*, here Debtor had access to information regarding its inventory through the
14 Seller Central Data, at least prior to October 22, 2013.³¹⁰ Furthermore, even if Amazon
15 had exclusive knowledge of relevant information regarding Debtor's inventory, this was
16 largely cured when Amazon produced the M15 Data, depositions of its employees, and
17 other discovery requests submitted by the Trustee. Because this Court finds that relevant
18 information regarding the Debtor's inventory was not exclusively in the hands of Amazon,
19 the Court also finds the burden of proof does not shift to Amazon.

20 ³⁰⁵ *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("[Defendant's] attempt to prove that
21 it provided a reasonable accommodation merely negates an element that [Plaintiff] was required to prove and
22 therefore was not an affirmative defense ...").

23 ³⁰⁶ *LL B Sheet 1, LLC v. Loskutoff*, 362 F. Supp. 3d 804, 818 (N.D. Cal. 2019) (quoting *Zivkovic v. S. California*
24 *Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002)).

25 ³⁰⁷ DE 370, pg. 6, lines 9–13, "The same principle applies here: because Amazon was in possession of the inventory
26 and had a duty to keep track of it, it was in a better position than the trustee to explain what happened. The Court
27 should thus place the burden on Amazon to prove the precise amount of inventory that was lost, damaged, or
28 destroyed, and if Amazon can't do so, then the Court should accept the trustee's evidence of damages, even if it's
only approximate." See also pg. 7, lines 16–18, "Amazon had the duty under the contract to keep track of [Debtor's]
inventory, and Amazon was 'in position to know and to produce the most probative facts concerning that inventory.'"
See also pg. 2, lines 4–6, "[I]n which the defendant – Amazon – had sole access to and control of the facts relating
to [Debtor's] inventory."

³⁰⁸ *Cedar River Water & Sewer Dist. v. King Cnty.*, 315 P.3d 1065, 1073 (Wash. 2013) (quoting *Jolliffe v. N. Pac.*
Ry., 100 P. 977 (Wash. 1909)).

³⁰⁹ *Exclusive*, *Dictionary.com*, <https://www.dictionary.com/browse/exclusive> (last visited May 17, 2021).

³¹⁰ Defined in Attachment 1 as the Termination Date.

1 The Washington Constitution assigns to the factfinder the ultimate power to weigh
2 the evidence and determine the amount of damages to be awarded, if any.³¹¹ If the Trustee
3 fails to meet its burden of proof, the failure cannot be cured by the Court placing the
4 burden on Amazon to prove the negative and Amazon's failure to do so.³¹² Likewise, if
5 the Trustee does meet his burden of establishing a prima facie case, the burden does not
6 shift to Amazon, nor does it require Amazon to prove the negative by the preponderance
7 of the evidence.

8
9 b) Conclusions Regarding Burden of Proof

10 An important component of the theory of Plaintiff's damages claim is that Debtor's
11 Contract with Amazon, in effect, called for a "Black Box" into which Debtor shipped its
12 inventory. Plaintiff contends that only Amazon controlled the inventory in the Black Box
13 and any reporting on what was happening in the Black Box was controlled by Amazon.
14 The Trustee suggests that if he could not fully or accurately prove damages then the master
15 of the Black Box (Amazon) should bear the burden of demonstrating all of what Amazon
16 did with Debtor's inventory. In effect, the Trustee suggests Amazon had the responsibility
17 to show it was not liable to Debtor and did not cause damage to Debtor rather than Plaintiff
18 having the burden of proving Amazon's breach of contract and the damages flowing from
19 the breach.

20 Plaintiff's Black Box theory reminds the Court of the tort concept of *res ipsa*
21 *loquitur*³¹³ where "the mere fact of an accident's occurrence raises an inference of
22 negligence that establishes a prima facie case."³¹⁴ Plaintiff has not cited a case applying
23 this concept to a breach of contract case and the Court will not do so now to either find a
24 breach by Amazon or impose upon Amazon a burden to disprove Plaintiff's damages.

25 ³¹¹ *Columbia Park Golf Course, Inc. v. City of Kennewick*, 248 P.3d 1067 (Wash. Ct. App. 2011) (trial court properly
26 submitted damages claim to jury).

27 ³¹² DE 370, pg. 6, lines 11–13, "The Court should thus place the burden on Amazon to prove the precise amount of
28 inventory that was lost, damaged or destroyed, and if Amazon can't do so, then the Court should accept the trustee's
evidence of damages, even if it's only approximate."

³¹³ A Latin phrase which translates as "the thing speaks for itself."

³¹⁴ Black's Law Dictionary, 9th Ed.

1 Among other things, Amazon did not alone control all the data in the Black Box. The data
2 was always shared with Debtor. Testimony at trial³¹⁵ suggested that Debtor maintained
3 poor inventory records and Debtor often operated in a chaotic state. It is not clear to this
4 Court that the Debtor preserved all the Seller Central Data or that the information stored
5 by the Debtor was accurate.³¹⁶ However, even if this Seller Central Data or the Settlement
6 Data was fully preserved by the Debtor, it was not introduced into evidence at trial by the
7 Trustee. The Court rejects the Trustee's "Black Box" theory of shifting the burden it bears
8 to prove Amazon's breach and/or Plaintiff's damages.

9
10 3. Findings Regarding Breach of Contract and Damages

11 a) Calculating Replacement Value

12 Under the Contract, Amazon is to pay Debtor the Replacement Value of a product
13 unit for which Amazon destroys, loses, etc. The Replacement Value calculated by
14 Morones is consistent with the FBA Lost and Damaged Inventory Reimbursement Policy.
15 This Contract provision specifically requires Amazon to reimburse Debtor the "estimated
16 proceeds of the sale of that same item."³¹⁷ The "estimated proceeds" is the amount of
17 money that the Debtor would have received if someone had purchased the item.³¹⁸
18 Amazon considers several factors when determining the reimbursement amount, including
19 "your sales history, the average FBA selling price on Amazon, the sales history of the
20 specific ASIN."³¹⁹ If there is not enough information to calculate the reimbursement
21 amount for an item, Amazon uses default reimbursement values broken down by product
22 category.³²⁰

23 Morones' calculation of the Replacement Value looked at the Debtor's sales
24 history and the average FBA selling price on Amazon, both of which are factors Amazon

25 ³¹⁵ For example, testimony by Soder.

26 ³¹⁶ Bachand testified the Settlement Data portion of the Seller Central Data regularly rolled so that the initial
Settlement Data presented to Debtor may not be accurate at a later date. See § VII(c)(4).

27 ³¹⁷ FBA Lost and Damaged Inventory Policy.

28 ³¹⁸ FBA Lost and Damaged Inventory Policy.

³¹⁹ FBA Lost and Damaged Inventory Policy.

³²⁰ FBA Lost and Damaged Inventory Policy.

1 uses to determine the reimbursement value. However, the FBA Lost and Damaged
2 Inventory Reimbursement Policy is unclear whether the “average FBA selling price”
3 refers to all products or the specific product that was lost or damaged. Morones used the
4 average sales price of all Debtor products. The Court agrees with Morones’ approach
5 concerning Replacement Value.

6 In calculating the Replacement Value, Morones relied on the M15 Data and
7 Settlement Reports. Morones stated the M15 Data may not be complete or accurate with
8 respect to every Debtor unit because not all inventory records were maintained in the
9 currently used data warehouse.³²¹ Amazon contends the M15 Data is the most complete
10 set of data it could produce to account for units in the FBA Program.

11 Relying on the Settlement Reports and M15 Data, Morones calculated the average
12 gross unit sales price for all Debtor’s products sold to determine an average sales price of
13 \$22/unit. Morones then subtracted Amazon’s fees, costs, and other credits and charges to
14 determine an average price of \$5.69/unit paid to Amazon from sales of Debtor’s units.
15 Finally, Morones arrives at the net average sales price to Debtor of \$16.31.³²² Morones
16 uses the net average sales price of \$16.31 as the Replacement Value, which is the amount
17 Amazon is required to pay the Debtor under the FBA Agreement.³²³ Amazon does not
18 meaningfully challenge these numbers. The Court finds these average figures are
19 appropriate under the circumstances of this case. These numbers shall be applied by the
20 Court to the units for which Amazon must pay the Plaintiff.

21
22 b) Cutoff Date of January 31, 2014

23 In determining damages, Morones used a cutoff date of January 31, 2014 because
24 the Trustee or his lawyers told her that was when the Parties’ business relationship

25 ³²¹ Morones’ Damages Report, ¶ 10. In concluding the M15 Data is incomplete or inaccurate, Morones relied on the
26 deposition of Bachand, a FRCP Rule 30(b)(6) witness for Amazon, where she states Amazon did not keep reliable
27 records regarding the exact purpose or amounts of reimbursements and that some of the data was backfilled from
28 older data sources. Morones’ Damages Report, ¶ 51; Deposition of Bachand, pg. 92, lines 6-16, pg. 142, lines 6-12,
pg. 145, line 23, pg. 147 line 12.

³²² Morones Damages Report, ¶ 32 & Schedule 1b.

³²³ Ex. 1, § F-4.

1 terminated.³²⁴ Amazon terminated the FBA Agreement with the Debtor by sending the
2 Termination Letter.³²⁵ At the end of the Termination Letter, there were instructions to the
3 Debtor, which stated:

4 Please create a Removal Order for your existing Fulfillment by
5 Amazon inventory as soon as possible. Under the FBA Service
6 Terms, we may elect to dispose of these products at your expense if
7 you do not submit a Removal Order within 90 days of the date your
8 account was terminated. Information on how to submit a Removal
Order is located in the Create Removal Orders section of Seller
Central.

9 The 90-day period mentioned in the Termination Letter ended on January 20, 2014.
10 The Trustee states an additional 11 days was given to Amazon to complete the requested
11 removals the Debtor made through submission of the Removal Orders, allegedly making
12 the cutoff date to determine damages January 31, 2014.³²⁶

13 The Trustee's contention that the Termination Letter creates a cutoff date of
14 January 31, 2014, is incorrect. The language of the Termination Letter explicitly states
15 that the Debtor had to submit a Removal Order within 90 days, not that Amazon had 90
16 days to complete the requested Removals. FBA Agreement, § F-7.2, states, "We may
17 dispose of any Unit we are entitled to dispose of in the matter we prefer." § F-7.1 of the
18 FBA Agreement says, "We may return Units to you for any reason, including upon
19 termination of these Service Terms." Pursuant to the Termination Letter and the FBA
20 Agreement, Amazon was under no obligation to complete the requested Removals within
21 the 90-day period mentioned in the Termination Letter.

22 In Williams' Rebuttal Report, he states the data which Amazon produced shows
23 that Amazon removed 19,890 units after January 31, 2014.³²⁷ These units, and other
24 transactions occurring after January 31, 2014, are omitted from Morones' calculations and
25 her Damages Report. Before the trial commenced, Morones' January 31, 2014, inventory

26
27 ³²⁴ Morones' Damages Report, pg. 19 n.37 & Schedule 1.

³²⁵ Termination Letter, Trustee's Trial Exhibit 120.

³²⁶ DE 266, Trustee's Motion for Summary Judgment, pg. 13.

³²⁷ Williams' Rebuttal Report, ¶ 11.

analysis end point was found by this Court to be improper because Amazon continued to return inventory to Debtor (or to destroy it as the case may be) well after January 31, 2014. Amazon proved to the Court's satisfaction that 19,980 units were returned or destroyed after January 31, 2014. The Court finds that Amazon must be given credit at \$16.31/unit for the 19,890 units Removed after January 31, 2014. That sum is to be applied against any inventory breach of Contract damages owed by Amazon to Debtor through January 31, 2014. However, as noted below, the Court is not awarding Plaintiff breach of Contract inventory damages for time periods prior to February 1, 2014.

4. Amazon's Contract Breach

The Contract calls for Amazon to care for and keep track of inventory placed in its hands by Debtor. If Amazon fails to do so, it is in breach of the Contract and is liable to Plaintiff for unreimbursed damages. Debtor apparently never challenged Amazon's accounting until the Trustee in December 2012 directed Bellino to make a demand for \$1 million of inventory received by Amazon but for which Debtor then claimed Amazon never paid for or returned to Debtor.³²⁸

a) The Settlement Data Was Not Introduced Into Evidence.

It is worth mentioning a few items gleaned by this Court in reviewing Attachment C to Morones' Damages Report. First, the Seller Central Data was produced from frequent, or perhaps daily, reports Amazon created and provided to Debtor over the eight-year course of their relationship. The Settlement Data was a subset of the Seller Central Data and included such information as sales of inventory, payments to Debtor, fees paid to Amazon, etc. This information was made available to Debtor via Amazon's Seller Central website. Amazon did not preserve all the Seller Central Data³²⁹ and the Trustee

³²⁸ However, Azzarelli testified that, prior to the Petition Date, Debtor did ask Amazon questions about Debtor's perception that its inventory in Amazon's hands was reported to be lower than Debtor thought it should be. See Ice Deposition, page 129, lines 1-18.

³²⁹ DE 378, Bachand's testimony at p. 93:3-12; Trial Day February 19, 2021. Although the Trustee vehemently contends the Debtor and Trustee preserved the Seller Central Data, including the Settlement Data (see DE 396, p. 2, ll. 13-15), Williams' Rebuttal Report notes Morones' Report relied on Settlement Data in her damages analysis, yet her data had certain Data Gaps which Williams largely filled in with information retrieved from Amazon. (See Trial

1 did not introduce it at trial. This Court finds nowhere in the Contract that Amazon was
2 contractually bound to retain all the Seller Central Data. Had the Trustee introduced all
3 the Settlement Data at trial it presumably could have fully and accurately identified at trial
4 all elements of its claims against Amazon and with precision could have demonstrated the
5 amount of damages it suffered due to Amazon's alleged breach of the Contract. Instead,
6 the Trustee's discovery demands resulted in Amazon producing the M15 Data, a gigantic
7 data dump which Amazon has confirmed to be "the most complete information known to
8 be available to account for the Debtor's units in the Fulfillment by Amazon Program."
9 However, all acknowledged that the M15 Data is not a complete set of the data once
10 generated by the Seller Central Data. The M15 Data, while massive, is nevertheless
11 incapable of fully explaining all the parties' transactions or all of the damages allegedly
12 suffered by Debtor. This is particularly true because the M15 Data does not include sales
13 information. The Trustee knew or should have known of this information gap as it was
14 spelled out in Amazon's September 20, 2016 Discovery Response.³³⁰ The Trustee's
15 counsel also apparently understood that the M15 Data did not include the Settlement Data
16 and the Trustee would need to review Settlement Data to understand all sales
17 transactions.³³¹ While this Court finds Amazon's September 20, 2016 Discovery
18 Responses adequately alerts the Trustee to the limitations of the M15 Data, Amazon
19 further clarified the M15 Data's limitations when it declared the "M15 [D]ata are the most
20 complete information known to be available to account for [Debtor's] 'Lost
21 Inventory'."³³² Knowing the M15 Data did not account for the Settlement Data, the
22 Trustee could have introduced the Settlement Data into evidence at trial. He did not. As a
23 consequence, this Court cannot conclude what sales proceeds were paid to Debtor by

24 Ex. 5, ¶¶ 19-20 and 49-51. See also § VI(D)(2) above.) The Court need not determine whether Debtor or the Trustee
25 did preserve all this Settlement Central Data as it was never admitted into evidence at trial.

26 ³³⁰ See DE 396, pp. 24-25 at n.55 where the Trustee quotes Ashworth's deposition testimony where he said the M15
27 Data "was described to us – to us being the trustee and his legal team – as the end-all, be-all record for those
28 transactions [i.e. inventory transactions] . . . and so we had enough data as it was and we struck to the [M15 Data].
The one area that we did not have any other format were the settlement records." (Emphasis supplied.) "Settlement
records' are also known as Settlement Data."

³³¹ See Trial Ex. 118 at Bates page No. 118.0036.

³³² DE 332, Joint Pretrial Statement, p. 7 of 122, ll. 1-2.

1 Amazon or what inventory units were transferred by Amazon to Debtor in lieu of cash
2 payments.

3 The Trustee takes Amazon to task by suggesting “Amazon refuses to respond to
4 discovery directed to differences between M15 Data and Seller Central Data.”³³³ Trustee
5 cites to three portions of Bachand’s testimony in support of this proposition.³³⁴ A close
6 review of Bachand’s testimony, however, reveals that she was not refusing (on behalf of
7 Amazon) to explain the differences between the M15 Data and Seller Central Data. Rather,
8 she tried to explain to Trustee’s counsel that these documents exist for different reasons
9 and that, in any event, Jeff Moore played a bigger role than her in Amazon’s
10 September 20, 2016 Discovery Responses.

11 The Trustee points to the FJC Manual for Complex Litigation which “advises that
12 where complex computerized data is at issue, the [i]dentification of computerized data
13 may lead to agreement on a single data base on which all expert and other witnesses will
14 rely in their testimony.”³³⁵ In this Court’s view, this is exactly what Amazon did to the
15 extent possible. The M15 Data was admittedly the best data set available “to account for
16 Debtor’s units” in Amazon’s hands “to account for [Debtor’s] ‘Lost Inventory.’” But the
17 M15 Data did not (and apparently could not) also account for all sales transactions. That
18 was available to all parties via the Settlement Data. Amazon complied with the spirit of
19 the FJC’s Manual by agreeing the M15 Data, together with the Settlement Data, supplied
20 the two data sets for the parties’ experts to rely upon in their Excel reports and expert
21 testimony.

22 The Trustee’s Comments to the Court’s Tentative Under Advisement Order³³⁶
23 warns that this Court would commit clear error if it were to find that the Debtor and
24 Trustee failed to preserve the Seller Central Data. Trustee points to testimony from
25

26
27 ³³³ DE 396, p. 28 of 71, § 5 Heading.

³³⁴ *Id.* at nn.56, 57 and 58.

³³⁵ DE 396, p. 25 of 71; see n.50 citing the Manual For Complex Litigation (Fourth) § 30.2 (2004).

³³⁶ DE 396.

1 Ashworth and contends the Debtor or Trustee did preserve the Seller Central Data³³⁷ and
2 then twice produced that information on two separate hard drives delivered to Amazon's
3 counsel.³³⁸ It is, however, not at all clear to this Court that the Trustee, through Ashworth
4 and/or Cathy Cameron, preserved all pertinent Settlement Data. Ashworth testified that he
5 downloaded the Settlement Data in pieces and did so from 2013 to 2015. He accomplished
6 these downloads directly from Amazon's Seller Central and not from the Settlement Data
7 earlier downloaded by Debtor's employees. This is problematic because, as Bachand
8 testified at trial:

9 Q. So has Amazon ever produced any data in this case that
10 would be adequate to make those determinations?

11 A. No, I don't think it exists.

12 Q. It doesn't – you don't think it exists? Would that have been
13 Seller Central data?

14 A. Both Seller Central and the underlying systems that Seller
15 Central pulls from, there are certain reports that are only
16 existing on a rolling basis. So, by the time the information was
17 requested, they would have already not existed anymore and
those are what I would use to do some of the cross-checking.

18 In other words, the sales data³³⁹ initially input by Amazon into Seller Central to reveal the
19 Settlement Data would not necessarily be the information that remained in Amazon's
20 computer system, even shortly after the initial input, much less years later when Ashworth
21 downloaded the Settlement Data on his two hard drives. For this reason, it is not clear to
22 this Court that the Trustee saved all the Settlement Data. More importantly, the Settlement
23 Data the Trustee or Debtor did maintain and transmit to Amazon was not introduced into
24 evidence at trial. This resulted in a failure of proof of the Trustee's damages because no
25 evidence of sales data (Settlement Data) was introduced at trial.

26 ³³⁷ DE 332, Joint Pretrial Statement at ¶ 4, p. 53 of 122, ¶18, p. 58 of 133, and ¶ 37, pp. 73-4 of 122. See also DE
27 396, pp. 8-21.

28 ³³⁸ There was concern that one hard drive was corrupted so a second was sent to Amazon's lawyers. Ashworth
Deposition at 26:15 – 28:9. See also DE 396, n.46.

³³⁹ DE 378, p. 93, ll. 3-12. February 19, 2021, Trial Testimony by Bachand.

1 b) Plaintiff's Proven Inventory Damages.

2 Morones' Damages Report contends that, as of January 31, 2014, Debtor's
3 inventory should have contained 39,331 units for a Replacement Value of \$641,521.
4 Williams' Rebuttal Report notes that January 31, 2014, is not the correct end date, that
5 20,405 units were held by Amazon as of March 31, 2015 and, in any event, Morones
6 misapplied inventory adjustment data so that either Amazon owed Debtor nothing or, at
7 most, \$137,516.

8 Morones demonstrates that Amazon's December 31, 2013, ending inventory
9 cannot be correct because, when the January 2014 inventory transactions are factored in,
10 it would leave Debtor with only 16,335 units in Amazon's hands which, of course, cannot
11 be true since Amazon later returned 19,980 units to Debtor. Moreover, the March 31,
12 2015, M15 Data indicates Amazon held 20,405 units of Debtor's inventory at that date.

13 Most surprising of all, Exhibits 181 and 182 demonstrate that, after all Removals
14 were effectuated by Amazon, as of March 31, 2015, Amazon's M15 Data still indicated it
15 held 20,405 units of Debtor's product. Debtor had no access to the M15 Data until May
16 2015 so it could not have known to ask Amazon for Removal of those 20,405 units and,
17 of course, it was by then long out of business so it could not monetize those inventory
18 units.

19 No evidence was presented to indicate Amazon returned these retained units to
20 Debtor or otherwise compensated Debtor for these units after March 31, 2015. Amazon
21 contends that it indisputably reimbursed Debtor for over \$300,000 and that these
22 reimbursements should be applied against the 20,405 units held by Amazon as of March
23 31, 2015.³⁴⁰ None of Amazon's reimbursements to Debtor occurred after March 31, 2015.
24 Moreover, Amazon does not contend that Debtor owed it money as of March 31, 2015.³⁴¹
25 While this Court (and the Trustee) recognizes that Amazon reimbursed Debtor over
26 \$300,000 over the course of the parties' relationship, none of those reimbursements can

27 ³⁴⁰ DE 397, pgs. 1-11.

28 ³⁴¹ Amazon's set off and recoupment counterclaims were withdrawn in the Joint Pretrial Statement. See DE 332 at
pg. 9 and DE 397 at pg. 5.

1 be nor will they be applied to the damages sustained by Debtor due to Amazon retaining
2 and not compensating Debtor for the 20,405 units held by Amazon as of March 31, 2015.
3 Again, March 31, 2015, was nearly two years after this Adversary Proceeding
4 commenced.

5 The Court finds that Debtor's "Ending Inventory" was 20,405 units. The Court
6 rejects the Ending Inventory calculations of Morones and Williams for the reasons more
7 fully discussed below. The Court further finds Amazon breached the Contract with
8 respect to these units. The Court finds Plaintiff has proven his damage in the amount of
9 the Replacement Value of 20,405 units. Amazon is liable to Debtor for \$332,806.³⁴² By
10 this ruling, the Court is not shifting the Amazon the burden of proving it reimbursed
11 Debtor for units of inventory. The fact that Amazon held 20,405 units of Debtor's
12 inventory as of March 31, 2015, and the fact that all of Amazon's reimbursements to
13 Debtor occurred long before that date and the fact that Debtor owes no money to Amazon
14 necessarily means Amazon owes Debtor for 20,405 units. The parties' Contract compels
15 this result.

16 What Morones does not convince this Court of in her Declaration, or her testimony
17 is why the Debtor's damage amount should include the full \$22/unit gross sales price.
18 \$5.69/unit is an amount which Debtor would not be entitled to if these units were fully
19 paid for by a customer because Amazon would be entitled to receive the entire \$5.69/unit.
20 Under any scenario, at most, Debtor would be entitled to receive only its due, i.e.,
21 \$16.31/unit. In effect, Morones is encouraging the Court to punish Amazon by forfeiting
22 its claim to fees and costs totaling \$5.69 per unit of loss, damage, etc. While the Court
23 assumes the Trustee would gladly accept such punishment damages, the Court has already
24 denied Trustee's claim for punitive damage.³⁴³ Assessing Amazon for \$5.69/unit would
25 not be a measure of Debtor's compensatory damages but, rather, a form of punitive
26 damages. In any event, the Court was not supplied with evidence suggesting Amazon

27
28 ³⁴² 20,405 units x \$16.31/unit.

³⁴³ See DE 91. See also DE 390 at 16.

1 obtained any fees on units not sold. More specifically, the Court received no evidence
2 indicating Amazon sold any of the 20,405 units or was paid a fee of 25% (or any amount)
3 on any of these 20,405 units. The Court rejects Morones' suggestion that Debtor's
4 inventory damages could or should be increased by \$5.69/unit.

5
6 c) The Court's Analysis of Codes Used by Amazon and the
7 Impact on Claimed Damages.

8 After discussing her Ending Inventory analysis, Morones' Damages Report
9 addresses the other three components of her damage calculations and then reduces overall
10 damage by \$305,611, the amount she finds Amazon Reimbursed back to Debtor. The
11 Court now reviews these components of Morones' damages calculations and discusses the
12 flaws in her findings as well as flaws in Williams' Rebuttal Report.

13 Morones identifies three categories of Reimbursable Adjustments: Warehouse
14 Damage Adjustments, Lost/Found Adjustments, and Mis-Received Adjustments.³⁴⁴ Units
15 in the Warehouse Damage Adjustments category were placed there by Morones when she
16 saw Amazon's application of Codes 5, 6, 7, D or E.³⁴⁵ This methodology is faulty because,
17 for example, a unit damaged by Amazon at its fulfillment center³⁴⁶ will also likely be
18 assigned another Code or two, like destroyed³⁴⁷ or paid to Debtor.

19
20 (1) Code M.

21 Units in Morones' Lost/Found category were placed there because she saw these
22 units had an assigned Code of M (misplaced) or F (found). M and F Codes were offset
23 against one another by Morones because M is a negative unit and F is a positive unit.
24 Again, this methodology is defective because a unit marked M could later be found (F) or
25 sold or destroyed (D), etc. A Code M unit would not necessarily be given a Code F when

26 ³⁴⁴ Morones reviews a number of Amazon's inventory codes but neither she nor Williams provided data indicating
27 the number of units bearing a given assigned code to this Court.

28 ³⁴⁵ See the Amazon Code descriptions at Exs. 2 and 147 which is also attached hereto as Attachment 3.

³⁴⁶ Code E.

³⁴⁷ Code D.

1 it is found because it might be a unit whose useful life had expired and would therefore
2 be destroyed (Code D) or sent back to Debtor or a found unit (F) could go straight to a
3 sale and not first logged in as a Code F.

4 Code M units cannot simply be offset by Code F units to determine Amazon's net
5 liability to Debtor. Trustee contends "... a unit given a Code M is no longer in the virtual
6 inventory, so that unit can't be given more codes."³⁴⁸ Trustee is incorrect. A Code M unit
7 is still in the "virtual inventory" maintained by Amazon. It just is in the inventory roster
8 as "missing." When that "M" unit is found, it could, contrary to Trustee's contention,³⁴⁹
9 be given a different code (e.g., F (found), D (destroyed), O (transferred to another owner),
10 N (reimbursed by a transfer to Debtor's inventory from another owner, etc.). The tally for
11 units coded M does not increase or decrease based on subsequent events. Once an M,
12 always an M. But that M coded unit could be subject to a whole host of other coding
13 events after the unit was first coded M. This is why Morones (and the Trustee) take too
14 simplistic a view by saying one need only take Code M units (102,341 says Morones) and
15 subtract Code F units (63,088) to get a damage suffered by Debtor in the amount of 39,253
16 units.

17 Trustee takes aim at Amazon for identifying theoretically possible double-counting
18 scenarios without admitting into evidence any actual units which were double counted.
19 However, the Court has been presented with evidence of units bearing many of the
20 possible double-counting codes (Q, D, N, etc.). Trustee has not and cannot show all the
21 codes ever attributed to a single unit because any given unit is not assigned a series of
22 codes through the life of that unit. Rather, a Code M is given to a unit which Amazon
23 realizes is missing but many codes could later be assigned to that particular unit as events
24 give occasion for another code assignment. That is why each code has a gross number of
25 units assigned that particular code. One cannot, as Trustee suggests, just say M minus F =
26 the number of units for which Amazon is liable to Debtor and that we can ignore all other

27 ³⁴⁸ DE 396, p. 41, ll. 16-17.

28 ³⁴⁹ *Id.*, p. 40, ll. 15-17.

1 codes. We cannot ignore other codes because those net M minus F units (38,371) may
2 well be assigned other codes after they receive an “M” coding.

3 Amazon does not bear the burden of proving which “M” units received a
4 subsequent code or codes. Trustee has the burden of proving its damages. Amazon does
5 not bear the burden of proving Debtor was not damaged. Amazon is not, as Trustee
6 maintains, “strictly liable”³⁵⁰ for the difference between units coded M and F. Amazon
7 has provided proof of a reasonable likelihood that a material number of “M” coded units
8 could have subsequently been coded with one or more of a number of codes.

9 The Court finds Amazon has demonstrated that it cannot be liable for the entirety
10 of the missing units (M) which were later found (F) and therefore is not “strictly liable”
11 to reimburse Debtor for these 38,371 units.³⁵¹ These multiple code designations cast a big
12 shadow upon Morones’ Damages Report calculations.

13
14 **(2) Code D.**

15 As to Morones’ analysis of Mis-Received Adjustments, the Court notes a given
16 unit can have several coding events while in Amazon’s possession. That unit could be
17 booked as a Receipt, but later coded as mis-placed (Code M), then found (Code F), then
18 damaged in Amazon’s fulfillment center (Code E), and finally Removed (i.e. sent back to
19 Debtor or destroyed (Code D)). If the total amount of mis-placed inventory is added to
20 the total number of units destroyed there will be some overlap. The extent of that overlap
21 cannot be ascertained through the M15 Data.

22
23 ³⁵⁰ DE 396, p. 40 of 71, l. 1.

24 ³⁵¹ Trustee contends code N units are a “red herring” because the description of Code N was not applied to lost units
25 and in any event were only 171 that would need to be netted against Code O units. Amazon hotly contests Trustee’s
26 contention that “during the entire existence of Amazon’s relationship with [Debtor] Amazon only transferred 171
27 inventory units to [Debtor] as reimbursement for warehouse damaged and lost inventory.” (See Trustee’s Brief at
28 DE 396, pp. 46 of 71, ll. 11-13). Amazon notes that the “reason those 171 units appear in the adjustments file (Code
N) as well as the reimbursement file (Reimbursement Inventory Quantity) is because, as Bachand testified, Amazon
in 2013 began transitioning its tracking process for unit reimbursements and Amazon accurately tracked these
transactions in both data sets.” DE 398, p. 15 of 21, ll. 7-10. Even if the Trustee is right as to application of N, the
netting of O against N and the *de minimus* number of units implied there are many other codes at play, not the least
of which are units denoted with Codes D and Q.

1 Some coded data does not necessarily reveal who is responsible for the changed
2 status of a given unit. A Code D (destroyed unit) could be Debtor's loss (if, for example,
3 it was destroyed because the unit was defective or expired and not removed but destroyed)
4 or could be a loss for which Amazon is responsible (i.e., a unit damaged at Amazon's
5 warehouse).³⁵² While units coded D may be "the end of the line," ³⁵³ that may not be the
6 beginning of the line for that unit. For example, that D unit could also bear an earlier Code
7 M (missing), F (found), H (damage via customer return), K (damaged as a result of item
8 defect), U (damaged by merchant) or 6 (damaged by inbound carrier). Trustee has not
9 carried his burden of proving the 17,924³⁵⁴ units coded D must all (or even mostly) be
10 paid for by Amazon.

11 Morones did not account for Code N units. The M15 Data indicates there were
12 16,585 Code N units.³⁵⁵ The Court finds the flaws in Morones' Damages Report calls into
13 question the validity of her Reimbursable inventory adjustments and Unpaid Refund
14 Reimbursements.

15 Based on these problems with Morones' analysis of these three "Reimbursable
16 Adjustments," the Court finds her damage calculations unreliable and unpersuasive. The
17 Court finds Plaintiff has not sustained its burden of proving "Reimbursement Adjustment"
18 damages by a preponderance of the evidence.

19
20 **(3) Code Q.**

21 Morones' Damages Report does not mention Code Q related damages and her
22 Declaration does not explicitly opine as to whether Code Q units, sellable or otherwise,
23 are properly counted as damages to Debtor's inventory. Although Trustee's expert did not
24 point to Debtor being entitled to damages based on units coded "Q," her trial testimony

25 ³⁵² See DE 310, Williams' Declaration at page 6, ¶ 16e which further discusses this scenario. s
26 ³⁵³ DE 396, p. 46, l. 5.

26 ³⁵⁴ See DE 396, pp. 45-48.

27 ³⁵⁵ Williams' Declaration at DE 310 also discussed Code 6 adjustments (damage by inbound carrier). Note that a
28 Code 6 damage could be an Amazon responsibility (if Amazon's carrier was used) or a Debtor responsibility (if a non-Amazon carrier was used). This further highlights the problem with using a given code to universally lay the damage responsibility on one party or the other.

1 did discuss Code Q damages and now the Trustee argues he is entitled to recover damages
2 for unsellable 84,000 Code Q units.³⁵⁶ A total of 150,092 to 166,279 units were given a
3 Code Q designation.³⁵⁷ From testimony by Bachand, Morones and Williams, the Court
4 concludes Amazon heavily used Code Q as a dumping ground when an Amazon employee
5 could not find anything else to do within a given unit. Over 40% of all units given a Code
6 Q were assigned that code within one month, July 2013.³⁵⁸

7 Cross-examination of Morones demonstrated that Code Q units could also be
8 designated as Code D (destroyed) or Code E (damaged at Amazon fulfillment center) and,
9 therefore, would be valueless. This, therefore, calls into serious question whether the
10 147,968 Code Q units referred to as “sellable” by Morones are indeed sellable. This Court
11 rejects Trustee’s blanket demand that Amazon be held liable for any sellable units which
12 have been given a Code Q designation. First, units given a Code Q will also be given
13 other codes and are, in such cases, duplicative codes for the same unit. Bachand testified
14 that all Code Q units will also be coded as D (destroyed), M (missing), 5 (stolen/theft) or
15 would be removed to the seller.³⁵⁹

16 Bachand acknowledges that during Debtor’s eight-year relationship with Amazon,
17 Code Q was poorly defined.³⁶⁰ In the Inventory Adjustments section of Amazon’s Help
18 section (part of Amazon’s “Program Policies” incorporated into the parties’ Contract,
19 Code Q is identified as “damaged-miscellaneous” and is defined as “[a] decrease of your
20 sellable inventory when damages cannot be attributed to a source.”³⁶¹ Trustee reads this
21 to mean if there is a sellable unit that is given a Code Q, Amazon owes the Debtor for that
22 unit because the Contract notes (and even Bachand and Williams agree)³⁶² that where
23 Amazon cannot put their finger on who or what caused harm to Debtor’s units, Amazon

24 ³⁵⁶ DE 396, pp. 48-58.

25 ³⁵⁷ DE 396, p. 49. See also DE 396 at p. 59, ll. 4-5.

26 ³⁵⁸ DE 396, p. 59, l. 5. 67,920 ÷ 166,279.

27 ³⁵⁹ Bachand Trial testimony (DE 364), February 18, 2021, p. 113, l. 3- p. 114, l. 14.

28 ³⁶⁰ *Id.* at 116, l. 6.

³⁶¹ Trial Exs. 2 and 147.

³⁶² Bachand Trial testimony (DE 364), February 18, 2021; Williams’ Rebuttal Report, Ex. 5 at Bates page No. 5.0020, n.43.

1 will be responsible for payment to Debtor. However, this Court is persuaded by Bachand's
2 testimony to the effect that, at all times, Amazon consistently managed Code Q units in a
3 manner that would always result in at least one of four other codes being applied to a Code
4 Q unit. Because all Code Q units ultimately had a different disposition (D, M, 5 or
5 Removal), Code Q cannot be a reliable measure of damage to a unit for which Amazon is
6 contractually liable to Debtor. Application of one or more of these four codes to a given
7 unit may give rise to a damage claim but coding a unit with a "Q" cannot be relied upon
8 as an accurate measure of Debtor's damage, even if the unit remained sellable. This fact
9 will affect the damage count. More importantly, Code Q is a code for which Amazon is
10 not necessarily liable because all Code Q units also bear another code designation.³⁶³ For
11 example, Amazon contends 86 to 91% of the units coded Q were products with expiration
12 dates suggesting that expired units may have initially been coded Q and later destroyed
13 (D) or removed to the Debtor.³⁶⁴ To grant the Trustee damages for all Code Q units, even
14 just as to sellable units (assuming the number of "sellable units" could be accurately
15 ascertained), would be contrary to the terms of the parties' Contract. The Court finds
16 Morones' measure of Code Q damages at \$2,413,470³⁶⁵ is unpersuasive. The Court finds
17 Plaintiff has not carried his burden of proof on this measure of Plaintiff's inventory
18 damages. The Court rejects Debtor's claim that all sellable units bearing a Code Q should
19 be paid to Plaintiff at the rate of \$16.31/unit.³⁶⁶

20
21 d) Unpaid Refunds.

22 Morones next discusses damages identified as "Unpaid Refund Reimbursements."
23 When discussing her measure of "Unpaid Refund Reimbursements," Morones' cross-

24
25 ³⁶³ See Bachand testimony.

26 ³⁶⁴ DE 398, p. 16 of 21, ll. 8-9. In this, Amazon cites to Trial Ex. 131.

27 ³⁶⁵ 147,974 x \$16.31/unit.

28 ³⁶⁶ Bachand contends Code Q signals a unit designation for which Amazon cannot be held responsible. The Court is not finding this to be so because Ice testified Code Q signified that the seller [Debtor] or Amazon or someone else could have caused damage to a unit assigned a Code Q. See Ice Deposition at page 129, lines 1-18. In any event, since Q units will later bear another code designation, Amazon may or may not ultimately be liable for damages pertinent to a Code Q unit.

1 examination revealed that some (maybe many) purchase refunds were paid to customers
2 because the products they received were defective, damaged, or expired. A customer
3 would not necessarily return such units to Amazon and, if they did, the unit would be
4 valueless to Debtor as it could not be resold. Therefore, Debtor would not be damaged by
5 receiving no refund Reimbursement from Amazon in this instance. This calls into
6 question the entire \$186,247³⁶⁷ of damages Morones tallied up as “Unpaid Refund
7 Reimbursements.” The Court finds Plaintiff has not carried its burden of proof on the
8 “Unpaid Refund Reimbursements” portion of his claimed inventory damages.

9
10 e) Sales Proceeds Not Remitted to Debtor.

11 Morones’ final damage category is sales proceeds not remitted to Debtor. Sales
12 proceeds not remitted are acknowledge by Morones as not totaling \$1,156,495 as first
13 reported by her if the Court finds the Data Gaps have been closed by data authenticated
14 by Amazon. The Court finds Amazon did authenticate no less than 87% of the Data Gaps.
15 Given this finding, Morones conceded her damage calculations attributable to sales
16 proceeds not remitted to Debtor by Amazon total \$172,851.³⁶⁸ As to remaining \$172,851
17 identified by Morones as Sales Proceeds not remitted to Debtor, Williams contends
18 reliance upon the M15 Data is misplaced because it does not address the financial
19 transactions of the parties and that Morones has not provided reliable evidence as to how
20 many units were lost or damaged or not otherwise accounted for in Ending Inventory or
21 Code N adjustments. The Court agrees with Williams and finds Morones’ Damages
22 Report does not reliably or sufficiently substantiate Plaintiff’s damages for sales proceeds
23 unpaid to Debtor. Failing in his proof on this issue, the Court finds Plaintiff’s demand for
24 damages of \$172,851 for Sales Proceeds Not Remitted to the Debtor are not proven by a
25 preponderance of the evidence.

26
27 ³⁶⁷ In any event, this \$186,247 amount referenced in Morones’ Declaration corrects her Damages Report which said
28 this amount of damages totaled \$197,721 per ¶ 9 of Ex. 172 or \$237,706 per ¶ 11 of Ex. 172.

³⁶⁸ Ex. 172, table at page 6.

1 f) Trustee Did Not Carry Its Burden of Proof on the Basis of
2 Amazon's Motivation for Termination of the Contract.

3 Through (1) testimony by Azzarelli to the effect that "lots" of Debtor's inventory
4 was unaccounted for by Amazon and (2) testimony by Shaffer to the effect that Debtor
5 brought this discrepancy to Amazon's attention and then found its access to the
6 amazon.com platform was terminated, the Trustee suggests Amazon terminated the
7 Contract because it was retaliating against Debtor. While the Trustee may well be justified
8 in his suspicions, this Court finds Plaintiff did not prove by a preponderance of the
9 evidence that Amazon's termination was linked to the Debtor challenging Amazon's
10 inventory data or methods. This Court lifted the Bankruptcy Stay to enable Amazon's
11 termination because Amazon satisfied the Court that Debtor was in breach of the Contract
12 in 2013. This finding was not contradicted by evidence at trial. The Court will not now
13 find Amazon breached the Contract by basing its platform access termination upon
14 Debtor's challenge to Amazon's accountings or inventory control methods.

15
16 g) Unclean Hands.

17 In its Answer and through some of the evidence presented at trial, Amazon suggests
18 Debtor has unclean hands and the Trustee should be denied recovery in this case due to
19 Debtor's allegedly unclean hands. For example, Amazon made much of the fact that the
20 Trustee in December 2012 asked Bellino to make a \$1 million demand on Amazon for
21 claimed inventory shortages, but Bellino instead made a demand for \$10.5 million. This
22 Court's decision does not stand on the veracity or character of Bellino so this Court makes
23 no findings as to whether his testimony is credible or not. Neither does this Court find
24 Amazon sustained its burden of proving its unclean hands defense.

25
26 h) Money Claimed Owing by Debtor to Amazon.

27 To the extent Williams' Rebuttal Report suggests the M15 Data and/or Settlement
28 Data indicate Debtor owed Amazon anything as of March 31, 2015, this Court finds

1 Amazon withdrew its counterclaims including counterclaims for setoffs or recoupment.
2 The data is confusing, yes, but it is also not as conclusive as Williams would have this
3 Court find. Both the M15 Data and the Settlement Data are incomplete data sets. Even if
4 Amazon did assert claims against Debtor, such claims could not be fairly ascertained by
5 this Court from the data provided.

6
7 **5. Conclusion on Breach of Contract Claims**

8 The Contract calls for Amazon to pay Debtor for lost, destroyed, and unaccounted
9 for units. Amazon breached the Contract by failing to fully live up to this duty with respect
10 to the 20,405 units of Debtor's inventory in Amazon's hands as of March 31, 2015.
11 Amazon is liable for this Contract breach for damages in the amount of \$332,806 plus
12 interest at 12% from April 1, 2015, until paid. All other inventory related damages sought
13 by Plaintiff are hereby denied as Plaintiff failed to sustain his burden of proof with respect
14 to such additional claimed damages. To the extent Morones recognized and Williams
15 confirms that Amazon reimbursed Debtor through the course of their relationship
16 (\$305,611 says Morones), this Court finds those Reimbursements were fully accounted
17 for long before March 31, 2015, through the morass of coded data supplied in the Seller
18 Central Data (including the Settlement Data) and are offset by all but the remaining 20,405
19 units. In other words, Amazon's Reimbursements to Debtor cannot now be offset against
20 or recouped from the \$332,806 damages awarded in this Order.

21
22 **D. Prejudgment Interest on Damages**

23 The Trustee seeks \$2,261,347 in prejudgment interest.³⁶⁹ Under Washington law,
24 if a Plaintiff is entitled to pre-judgment interest, that interest accrues at the rate of 12% per
25 annum simple (not compounded) interest. Morones was instructed by the Trustee to apply
26 prejudgment interest to the inventory damages at 12% simple interest.³⁷⁰ Prejudgment

27
28 ³⁶⁹ Morones Expert Report, Schedule 1.

³⁷⁰ Morones Expert Report, ¶ 54.

1 interest was calculated from January 11, 2011, the mid-point of the Debtor's involvement
2 in the FBA Program,³⁷¹ through May 10, 2019, the date of Morones Damages Report.³⁷²

3
4 a) Legal Analysis

5 When addressing the question of Plaintiff's claim to pre-judgment interest this
6 Court must look to Washington law. Washington courts generally favor prejudgment
7 interest based on the premise that a party that retains money it should have paid to another
8 should be charged interest.³⁷³ Awarding pre-judgment interest compels a party that
9 wrongfully holds money to disgorge the benefit.³⁷⁴ It may be safely said that the tendency
10 has been in favor of allowing interest rather than against it, and that the degree of certainty
11 or ease with which the approximate amount can be ascertained has grown less and less
12 stringent.³⁷⁵

13 Prejudgment interest can be awarded if the claim upon which recovery is based is
14 "liquidated."³⁷⁶ A claim is "liquidated" where the evidence furnishes data which, if
15 believed, makes it possible to compute the amount with exactness, without reliance on
16 opinion or discretion.³⁷⁷ The rationale for this rule is that it would be unfair to hold a
17 defendant accountable for interest on an amount that is unquantifiable and unforeseeable
18 prior to a jury verdict.³⁷⁸

19 A claim is unliquidated if the factfinder must exercise discretion to determine the
20 measure of damages.³⁷⁹ The fact that an amount is disputed does not render the amount
21

22 ³⁷¹ Morones assumed a beginning date of January 1, 2008, and an end date of January 31, 2014. Morones Expert
23 Report, ¶ 54.

24 ³⁷² Morones Expert Report, ¶ 54.

25 ³⁷³ *Rekhter*, 323 P.3d at 1050 (quoting *Pierce County v. State*, 185 P.3d 594 (Wash. Ct. App. 2008)).

26 ³⁷⁴ *Rekhter*, 323 P.3d at 1050 (quoting *Mahler v. Szucs*, 957 P.2d 632 (Wash. 1998)).

27 ³⁷⁵ *Rekhter*, 323 P.3d at 1050 (quoting *Prier v. Refrigeration Eng'g Co.*, 442 P.2d 621 (Wash. 1968)).

28 ³⁷⁶ *Car Wash Enters., Inc. v. Kampanos*, 874 P.2d 868, 875 (Wash. Ct. App. 1994) (citing *Hansen v. Rothaus*, 730 P.2d 662 (Wash. 1986)). See also *OTR Wheel Engineering, Inc. v. West Worldwide Services, Inc.*, 743 F.App'x 771 (2018) (9th Cir. Memorandum Decision).

³⁷⁷ *King Cy. v. Puget Sound Power & Light Co.*, 852 P.2d 313, 315 (Wash. Ct. App. 1993) (citing *Prier v. Refrigeration Eng'g Co.*, 442 P.2d 621 (Wash. 1968), review denied, 863 P.2d 1352 (Wash. 1993)).

³⁷⁸ *Rekhter v. State, Dep't of Soc. & Health Servs.*, 323 P.3d 1036, 1047 (Wash. 2014).

³⁷⁹ *Aker Verdal A/S v. Lampson, Inc.*, 828 P.2d 610 (Wash. Ct. App. 1992).

1 unliquidated.³⁸⁰ A claim may be liquidated even if a dispute exists over all or part of the
2 claim.³⁸¹ It is the character of the original claim, rather than the court's ultimate method
3 for awarding damages, that determines whether prejudgment interest is allowable.³⁸²

4 The 20,405 units held by Amazon on March 31, 2015, appear to be a matter of fact
5 not in dispute between the parties yet Morones did not focus on this amount as she was of
6 the belief that Plaintiff's damages were much larger and could be ascertained from a
7 different view of the data. Williams, on the other hand, mentions these 20,405 units more
8 to demonstrate Morones' assumptions and methodology were faulty as opposed to
9 conceding Amazon must pay Plaintiff for these units. The complexity of the data, the
10 shortcomings in the data and the hot contest over what the data could and could not prove
11 are all givens in this case. That said, the M15 Data demonstrated that 20,405 units of
12 Debtor's inventory were held by Amazon as of March 31, 2015. Plaintiff's inventory
13 damages of \$332,806 were liquidated damages upon which Plaintiff shall be awarded
14 prejudgment interest. Plaintiff's prejudgment interest on its \$332,806 damage award shall
15 run from April 1, 2015, at the rate of 12% (Washington statutory rate), until paid.

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17
18
19
20 ³⁸⁰ *Bishop v. Baublits*, No. 53142-9-II, 2021 WL 876939, at *3 (Wash. Ct. App. Mar. 9, 2021) (citing *Forbes v. American Bldg. Maintenance Co. West*, 240 P.3d 790 (Wash. 2010)).

21 ³⁸¹ 25 DAVID K. DEWOLF ET AL., WASHINGTON PRACTICE SERIES, CONTRACT LAW AND PRACTICE § 14:14 (3d ed.
22 2020) (citing *Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Grays Harbor County*, 266 P.3d 229 (Wash.
23 Ct. App. 2011) (sufficient evidence supported contractor's claim for lost profits resulting from public utility district's
24 alleged breach of contract); *Forbes v. American Bldg. Maintenance Co. West*, 198 P.3d 1042 (Wash. Ct. App. 2009),
25 *judgment aff'd in part, rev'd in part on other grounds*, 240 P.3d 790 (Wash. 2010) (trial court properly awarded
26 prejudgment interest on attorney's fees claim even though parties disputed method of calculation); *Polygon*
27 *Northwest Co. v. American Nat. Fire Ins. Co.*, 189 P.3d 777 (Wash. Ct. App. 2008) (trial court properly applied
28 prejudgment interest to equitable indemnity claim for settlement even though formula for allocation was
disputed); *Bostain v. Food Exp., Inc.*, 153 P.3d 846 (Wash. 2007) (trial court properly awarded prejudgment interest
on claim for overtime wages wrongly withheld); *Scozzolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 145
P.3d 371 (Wash. 2006) (claim was liquidated even though defendant successfully challenged portions of plaintiff's
damage claim); *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 828 P.2d 610 (Wash. Ct. App. 1992); *Pederson's Fryer*
Farms, Inc. v. Transamerica Ins. Co., 922 P.2d 126 (Wash. Ct. App. 1996) (since the character of the underlying
claim—in this case the cost of pollution cleanup—was liquidated, prejudgment interest was appropriate)).

³⁸² *Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Grays Harbor County*, 266 P.3d 229 (Wash. Ct. App.
2011) (citing *Prier v. Refrigeration Eng'g Co.*, 442 P.2d 621 (Wash. 1968), *rev. den'd*, 863 P.2d 1352 (Wash. 1993)).

1 b) Conclusion on Prejudgment Interest

2 Plaintiff's inventory damages awarded by this Court were liquidated as of March
3 31, 2015. The Trustee previously stipulated to his damages being approximate³⁸³ and that
4 Plaintiff's evidence is admittedly not precise.³⁸⁴ Nevertheless, this Court has fixed
5 Plaintiff's inventory damages at \$332,806 based on the unaccounted-for inventory of
6 20,405 units. This amount was quantified and foreseeable before trial. The Court finds
7 Plaintiff's inventory damages of \$332,806 were liquidated so Plaintiff is entitled to
8 prejudgment interest on such amounts from April 1, 2015, at 12% simple interest per
9 annum.

10
11 **VIII. SUMMARY OF CONCLUSIONS**

12 This Adversary Proceeding concerns the Trustee's claims against Amazon (1) for
13 breach of the Contract and turnover of the damages owed by Amazon and (2) for stay
14 violation damages. Amazon's stay violation itself was ascertained by the Court long
15 before trial so the trial was simply a matter of trying Plaintiff's claimed damages. The
16 Court rejects Amazon's efforts to contain the stay violation damages to the 15 days when
17 Amazon was violating the Bankruptcy Stay. Amazon's harm to Debtor reverberated
18 throughout Debtor's business right until the day its business was effectively obliterated
19 by Amazon's ultimately lawful termination of Debtor's access to amazon.com. While the
20 Court agrees with Morones view that the stay violation damages continued through
21 October 22, 2013, the Court disagrees that Debtor's correct financial baseline was
22 established between November 2012 and March 2013 or that Debtor's sales could be fairly

23
24 ³⁸³ DE 370, Trustee's Brief on Burden of Proof, pg. 7, lines 21-22, "The trustee met his burden of proof with
25 admissible evidence showing at least the *approximate amount of missing or damaged inventory*." (Emphasis added).
26 See also pg. 6, lines 11-13, "The Court should thus place the burden on Amazon to prove the precise amount of
27 inventory that was lost, damaged or destroyed, and if Amazon can't do so, then the Court should accept the trustee's
28 evidence of damages, even if it's only approximate."

³⁸⁴ DE 370, pg. 3, line 27, pg. 4, lines 1-4, "Although [Debtor] has presented admissible evidence from which
damages can be quantified, the evidence is admittedly neither perfect nor precise. Sometimes evidence seems in
conflict, the effect of some facts remains unclear, and some facts simply don't 'add up,' both literally and
metaphorically."

1 projected to grow after April 2013. The Court awards Plaintiff stay violation damages of
2 \$668,484 plus interest from the entry of this Court's judgment, until paid.

3 Plaintiff's inventory damage claims were handicapped by inadequacies in both the
4 M15 Data and available Seller Central Data or Settlement Data. Plaintiff blames Amazon
5 for not providing all the data from which damages could be fully and clearly established.
6 However, the Trustee did not introduce at trial all the Seller Central Data which Debtor
7 had been supplied by Amazon over the course of this eight-year relationship or even the
8 Settlement Data which reflected sales transactions concerning Debtor's inventory.
9 Plaintiff contends all this data was preserved by Plaintiff, yet it was not introduced into
10 evidence. Moreover, Plaintiff has not shown this Court that Amazon had a duty to
11 preserve what unquestionably would be a colossal data set, especially where that data was
12 not questioned by Plaintiff until years into their business relationship. The burden of proof
13 on Amazon's Contract breach and the burden of proving Plaintiff's damages will not be
14 shifted to Amazon. Plaintiff was required to prove by a preponderance of the evidence
15 both Amazon's breach and Plaintiff's resulting damages.

16 At the end of the day this Court finds that, despite the game efforts of his damages
17 expert Morones, Plaintiff failed to prove by a preponderance of the evidence that Amazon
18 breached the parties' Contract beyond Amazon's failure to compensate Plaintiff for the
19 20,405 units held by Amazon as of March 31, 2015. Since Plaintiff's breach of Contract
20 claims and damages were liquidated as of March 31, 2015, Plaintiff is entitled to
21 prejudgment interest on Plaintiff's inventory damages of \$332,806 at 12% per annum
22 from April 1, 2015, until paid.

23
24 **IX. ORDER**

25 Plaintiff's attorneys are directed to lodge a form of judgment consistent with this
26 Order.

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Definitions

The following terms either have been defined by the parties in this litigation or are described in the manner in which they are used in the Court's Under Advisement Order:

ABSA: Amazon Services Business Solutions Agreement. The ABSA is also referenced as the FBA Agreement.

Admin. DE: Docket entries in the Debtor's bankruptcy filed with the District of Arizona at Case NO. 2:11-bk-28944-DPC.

Adversary Proceeding: Case No. 2:13-ap-00799-DPC filed in the chapter 11 bankruptcy of the Debtor.

Adjustments: Inventory record changes by Amazon when an event impacted Debtor's inventory in Amazon's hands.

Adjustment Codes: Codes that describe inventory events impacting a seller's inventory account, such as damaged, missing, found, and transferred. See Trial Ex. 2.

Affirmative Expert Report: Serena Morones' Affirmative Expert Report dated May 10, 2019.

AFTT: Amazon Fulfillment Technology Team.

Aged Inventory: Inventory that has not been sold within 90 days.

Amazon: Amazon Services, LLC

Amazon's September 20, 2016 Discovery Response: See Trial Ex. 118, in particular at Bates No. 118.0036.

Answer: The Amended Answer filed by Amazon at DE 5 in response to Plaintiff's Complaint.

Ashworth: Stephen Ashworth, a consulting expert witness employed by the Trustee.

ASIN: Amazon Standard Identification Number.

ASIN Merge: The combination of two or more ASIN's.

Azzarelli: Thomas Azzarelli, Debtor's one-time Chief Financial Officer.

Bachand: Tasha Bachand, an Amazon employee.

Bankruptcy Case or Bankruptcy Proceeding: Debtor's administrative bankruptcy proceeding, 2:11-bk-28944-DPC.

Bankruptcy Code: U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1532.

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Bellino: Daniel A. Bellino, a founder of Debtor.

Code 1: Indicates software correction of inventory discrepancies.

Code 2: Indicates software correction of inventory discrepancies.

Code 3: Indicates product redefinition and transfer in from original inventory item.

Code 4: Indicates product redefinition and transfer out to new inventory item.

Code 5: Indicates unrecoverable inventory.

Code 6: Indicates unit damaged by inbound carrier.

Code D: Indicates unit is destroyed.

Code E: Indicates unit is damaged at Amazon fulfillment center.

Code F: Indicates unit is found.

Code H: Indicates unit is damaged - customer return.

Code J: Indicates software correction of inventory discrepancies.

Code K: Indicates unit is damaged as result of item defect.

Code M: Indicates unit is misplaced.

Code N: Indicates receipt of unit from another owner.

Code O: Indicates transfer of unit to another owner.

Code P: Indicates unsellable inventory.

Code Q: Signifies damage – miscellaneous.

Code U: Indicates unit damaged by merchant.

Code X: Indicates correction for inbound shipment receiving discrepancies.

Complaint: Plaintiff's Complaint filed in the Adversary Proceeding on July 9, 2013.

Cone: Jeffrey Cone, a consulting expert witness employed by the Trustee.

Contract: Ex. 2. The Merchants@Amazon.com Program Agreement and the Amazon Services Business Solutions Agreement collectively referred to as the Contract.

Creditors Committee: Official Committee of Unsecured Creditors appointed by the United States Trustee on November 9, 2011.

Cutoff Date: January 31, 2014—the date after which Morones disregarded M15 Data at the direction of the Trustee's counsel.

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CSV: Comma Separated Values.

DAB: An alternative name of the Debtor. The initials of David A. Bellino.

Data Gaps: Time periods within the Settlement Reports produced by the Trustee where no Debtor activity was included. The identified gaps are at least six 48-hour periods that occurred in January and March 2010.

DE: Docket entry in the Adversary Proceeding.

Debtor: Potential Dynamix, LLC

Deep Dive: See testimony of Justin Ice at page 61 of the Order.

Defendant: Amazon Services, LLC

Dewberry: Dustin Dewberry, an Amazon employee.

Disclosure Statement: The Disclosure Statement filed at Admin. DE 219.

Dot Missing SKU: Debtor incorrectly formatted SKUs and there were “dot missing SKUs.” A “Dot Missing SKU” happened when Amazon would just choose a SKU for inventory it received if it did not know which SKU it belonged to.

Ex.: Trial Exhibits.

Expected Ending Inventory: The Debtor’s inventory expected to be remaining in Amazon’s possession at the end of the Debtor’s relationship with Amazon.

FBA: Fulfillment By Amazon, which is an Amazon service in which Debtor paid Amazon to receive its inventory and pick, pack, ship, and provide customer service for that inventory.

FBA Agreement: Also known as the ABSA.

FBA Program: Amazon’s Fulfillment by Amazon Program

First Motion in Limine: Trustee’s Motion in Limine to Preclude the Admission of “Deep Dive” Documents into Evidence.

FJC: The Federal Judicial Center.

Flores: Diana Flores, an Amazon employee.

FNSKU: Fulfillment Network Stock Keeping Unit.

Ice: Justin Ice, a former employee of Amazon.

Joint Pretrial Statement: Joint Pretrial Statement: DE 332.

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Lawcock: Sean Lawcock, Debtor's former inventory manager.

Limitations Clause: ¶ 8, page 5 of 28, of the Contract (Ex. 1).

Lost/Found Adjustment: As used in Morones' Damages Report this term represents inventory identified in the M15 Data as misplaced (Code M) or found (Code F).

M15 Data: Inventory transaction data that Amazon produced in May 2015. Amazon described the M15 Data as follows: "Amazon has made reasonable efforts to identify and produce in the May 2015 Production transaction-level data for the Debtor's Units in the Fulfillment By Amazon Program but ... the files may not be complete or accurate with respect to every Debtor Unit. The May 2015 Production consists of multiple data streams compiled across multiple Amazon teams and also likely includes some erroneous entries as a result of employee transcription error. During the period in which the Debtor was selling its products through Amazon's website, not all inventory in the currently used data warehouse. There may be incomplete information in the May 2015 Production from transcribing older inventory tracking resources to the currently used system. Nonetheless, the May 2015 Production is the most complete information known to be available to account for the Debtor's Units in the Fulfillment By Amazon Program."

May 2015 Data Production: Also known as M15 Data.

Merchant Program: Amazon Merchant Fulfilled Network

Moore: Jeff Moore, an Amazon employee.

Morones: Serena Morones, Plaintiff's damages expert.

Morones' Damages Report: Ex. 7, Serena Morones' Affirmative Expert Report dated May 10, 2019.

Morones Declaration: Ex. 172.

Net Average Price per Unit: The unit price Morones developed and applied in her report, defined as follows: "I calculated the average gross unit sales price for all PD products sold, and then subtracted Amazon's fees, costs, and other credits and charges, to arrive at the net average sales price of \$16.31."

Net Sales: Customer Sales, less Customer Returns.

OMX: An Amazon inventory tracking system. See Reilly's deposition testimony.

Order: The Under Advisement Order of this Court entered at DE ____.

Payment Report: See Settlement Data, Settlement Report and Settlement Record.

Peeples: Josh Peeples, an employee of Debtor.

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Petition Date: October 13, 2011.

Plaintiff: Timothy H. Shaffer, Chapter 11 Trustee for Debtor.

Plan: Joint Plan of Reorganization filed at Admin. DE 217.

Reason Codes: A letter or number assigned to identify Adjustments. For example, Code “M” represents a missing inventory unit, and Code “F” represents a found inventory unit.

Receipt: Inventory units shipped from Debtor to Amazon and received into Amazon’s fulfillment centers. A Receipt increases Debtor’s inventory balance.

Refund Reimbursements: Payments or inventory transfers to compensate Debtor for certain customer Returns. If a customer initiates a Return but does not return the full item or if Amazon is responsible for the reason generating the return, Amazon issues a refund reimbursement.

Reilly: Thomas Reilly, Debtor’s former Chief Operating Officer.

Reimbursements: Compensation provided by Amazon to Debtor, either in the form of payment or inventory replacement from Amazon.

Removed or Removal: At Debtor’s request, the act of Amazon either sending inventory units back to Debtor or destroying inventory units (typically so that Debtor does not have to pay shipping or long-term storage fees). Debtor may choose to have certain Removals automated and they may manually request Removals. Removals decrease Debtor’s inventory balance.

Return: The reversal of a customer sale, upon the request of a refund by a customer. Returns increase Debtor’s inventory balance.

Sales: Inventory units shipped by Amazon to a customer after that customer purchases the inventory from Debtor. Sales reduce Debtor’s inventory balance.

Sales Proceeds Not Remitted: Net proceeds from a sale by the Debtor that Morones asserted had not been remitted to the Debtor.

Schmidt: Matthew Schmidt, a co-founder of Debtor.

Second Motion in Limine: Amazon’s Motion in Limine to Exclude Unpleaded and Untimely Claims and Damages Theories

Seller Central: A web-based interface displaying for sellers inventory reports and information about their participation in the FBA program.

Seller Central Data: The information disseminated on Seller Central is referred to as the Seller Central Data. The Trustee notes this is a “very broad term that encompasses many

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reports Amazon made available to FBA Sellers through the Seller Central portal to track and management [sic] their inventory.”¹ Settlement Data is but one of the reports contained in the Seller Central Data.

Settlement Data: The information disseminated on Seller Central reflecting “payments to FBA Sellers.”² The Trustee appears to use the term “Settlement Data” interchangeably with “Settlement Report,” Settlement Record” and “Payment Report.”³

Settlement Records: See Settlement Data.

Settlement Reports: See Settlement Data.

Shacklock: Susan Shacklock, Debtor’s accounting manager.

SKU: Stock-Keeping Units.

Soder: Eric Soder, a former Amazon employee.

State Court: Arizona Superior Court, Maricopa County

Termination Date: October 22, 2013.

Third Motion in Limine: Amazon’s Motion in Limine to Exclude the Testimony of Expert Serena Morones

Trustee: Timothy H. Shaffer, Chapter 11 Trustee of Debtor.

UST: United States Trustee

Unaccounted Inventory: Debtor’s inventory which Amazon has not accounted to Debtor.

Unpaid Refund Reimbursements: Referenced reimbursements due Debtor but which have not been paid by Amazon or for which Amazon has not transferred product to Debtor.

VHD: Virtual hard drives.

Warehouse Damage Adjustments: As used in the Morones’ Damages Report, this term represents inventory identified in the M15 Data as damaged pursuant to the following reason codes: 5, 6, 7, D or E.

Williams: E. Weiant Williams, Amazon’s rebuttal expert.

Williams’ Rebuttal Report: Trial Ex. 5, dated September 14, 2020.

¹ DE 396, p. 5, n.14.

² DE 396, p. 5, n.14.

³ See DE 396, p. 17: 1-3 and ns.38 and 39.

Attachment 2

| Admitted | No. | Joint Exhibits | Bates/Identifier |
|----------|-----|--|----------------------------|
| 02/16/21 | 1 | FBA Agreement ("ASBSA") | PD005574 |
| 02/16/21 | 2 | DAB Inventory Adjustments from Seller Central | AMAZON0008429 |
| 02/16/21 | 3 | Email from Diana Flores to Sean L et al re Inventory Reconciliation | AMAZON0002551-0002552 |
| 02/16/21 | 4 | Email from Diana Flores to Sean L dated March 28, 2013 re Inv Reconciliation | AMAZON0002585 |
| 02/16/21 | 5 | Rebuttal Report of E. Weiant Williams | N/A |
| 02/16/21 | 6 | Merchants@Amazon.com Program Agreement | N/A |
| 02/16/21 | 7 | Morones 5/10/19 Expert Report | N/A |
| 02/16/21 | 8 | 12/7/10 Lawcock Email Re: 404 SKUs | AMZ DABP 00154608 / DX 159 |
| 02/16/21 | 9 | 3/1/19 Schian Email Re: Pot Dynamix Ch. 11 Disclosure Statement | DX 189 |
| 02/16/21 | 10 | 4/2/13 Flores Email Re: Inv Reconciliation - Update - DAB | AMAZON0002593 |
| 02/16/21 | 11 | 4/15/13 Seller Central Case Details Report | SHAFFER0287 / DX 182 |
| 02/16/21 | 12 | 5/7/13 Bellino Email Re: Another Graph Restricted Product | DX 155 |

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| Admitted | No. | Trustee Exhibits | Bates/Identifier | Amazon Objection | Description of Amazon Objection | Note |
|----------|-----|--|------------------|---|--|---|
| 02/16/21 | 104 | Initial Disclosures of Amazon Services, LLC | N/A | No objection. | | |
| 02/16/21 | 105 | E. Weiant Williams Handwritten Notes re Interviews with Amazon Employees | AMAZON00011027 | Privilege. FRCP 26(b)(4)(B)-(C). | Object to the extent the Trustee seeks to question Mr. Williams about the notes redacted on the basis of privilege (draft reports and communications with counsel). | |
| 02/16/21 | 107 | Extract of M15 data of seven returned units after 12/31 | N/A | Foundation. FRE 602. Authenticity. FRE 901. | This was Exhibit 11 to Mr. Williams's deposition, which Mr. Dangerfield confirmed during the deposition was "one you [Mr. Williams] definitely have not seen in this format." Williams Dep. at 168:13-19. | |
| 02/16/21 | 116 | Letter from Eric Weiss to Scott Goldberg dated October 30, 2018 re Response to Trustee Questions | N/A | Foundation. 602. Hearsay. 801, 802. | These are attorney communications that constitute inadmissible hearsay. The Trustee also has not designated a witness who will lay a foundation for the document. | |
| 02/19/21 | 119 | Second Supplemental Disclosure Statement Pursuant to Fed. R. Bankr. P. 7026 | N/A | The disclosure contains unpleaded and untimely claims and damages theories. | Those unpleaded and untimely claims and theories include for "damaged" inventory, "Refunds Paid by Amazon Not Returned by Customer," and "Sales Proceeds Not Remitted to Potential Dynamix." Evidence related to the unpleaded claims may not be admitted. | |
| 02/18/21 | 131 | May 2015 Data Production by Amazon | N/A | No objection. | | Trustee will not admit to the admissibility of this exhibit and therefore will not agree to move it to the joint exhibit list |
| 02/16/21 | 140 | Letter from Scott Goldberg to John S. Kaplan dated December 31, 2014 | N/A | Foundation. 602. Relevance. 401. Hearsay. 801, 802. | This is an attorney communication that constitutes inadmissible hearsay. The Trustee also has not designated a witness who will lay a foundation for the document, and the document is irrelevant to the issues at trial. | |
| 02/16/21 | 141 | Letter from John S. Kaplan to Scott Goldberg dated January 7, 2015 | N/A | Foundation. 602. Relevance. 401. Hearsay. 801, 802. | This is an attorney communication that constitutes inadmissible hearsay. The Trustee also has not designated a witness who will lay a foundation for the document, and the document is irrelevant to the issues at trial. | |
| 02/16/21 | 144 | April 11, 2013 letter from Amazon to Potential Dynamix, LLC terminating Merchants@Amazon.com Program Agreement | N/A | No objection. | | Not a duplicate |
| 02/16/21 | 147 | FBA "Inventory Adjustments" document | N/A | No objection. | | Not a duplicate |
| 02/16/21 | 148 | FBA "Amazon Fulfillment Reports" document | N/A | Foundation. FRE 602. Authenticity. FRE 901. | The document contains a graphic whose source is unknown. | Not a duplicate |

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| | | | | | | |
|----------------------|-----|---|-----------------------|--|--|--|
| 02/16/21 | 151 | Internet Archive Wayback Machine capture of FBA Lost and Damaged Inventory Reimbursement Policy dated March 5, 2013 | N/A | Foundation. FRE 602. Authenticity. FRE 901. Hearsay. FRE 801, 802. | The Trustee has not authenticated the "Internet Archive" document or disclosed a trial witness who can do so. He also has not designated a trial witness who can provide a proper foundation for the document. This document is an out of court statement from the Internet Archive and, as such, it is inadmissible hearsay. | |
| 02/19/21 | 154 | Amazon diagram of FBA reimbursement | N/A | Foundation. FRE 602. Authenticity. FRE 901. Cumulative. FRE 403. | The document contains a graphic whose source is unknown. It is also cumulative of portions of other documents the Trustee seeks to admit. | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 156 | Email from Diana Flores to Cynthia Williams dated March 6, 2013 re February 21st meeting | AMAZON0002499-0002502 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 157 | Email from Diana Flores to Riley Althausen & Kunal Kande re DAB Analysis - Feb 2013 (includes attachment) | AMAZON0003737-0003738 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 160 | Monthly Operating Reports from Nov 2012 to Oct 2013 | N/A | Incomplete. FRE 106. Relevance. FRE 401. | Object to the extent the Trustee attempts to use the operating reports to prove the amounts of fees the Debtor paid; the Trustee has not properly pleaded or disclosed claims for the disgorgement of fees paid by the Debtor. Under the rule of completeness, the Trustee must submit the entire period of monthly operating reports that Ms. Morones considered (beginning in October 2011). | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 02/18/21 | 161 | Settlement data files | N/A | Relevance. FRE 401. | The Trustee has relied on the settlement reports as evidence of damage for the Trustee's unpleaded and untimely claims/damages theories. The reports are irrelevant because all evidence related to the Trustee's unpleaded and untimely claims must be excluded. | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 163 | Email between Gowey and Engdahl dated May 6, 2013 | Amazon0008731 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 166 | Email from Diana Flores to Diana Flores dated May 13, 2011 re DAB – James Thomson input | AMAZON0000555 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 167 | Email from Diana Flores to Sean Lawcock dated October 17, 2011 re Missing Inventory for DAB Unlimited | AMAZON0001366 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 168 | Email from Brandon Haskell to Patrick Gowey dated January 28, 2013 re FBA Reconciliation Case/RMS Processing - Seller Support and FBA Credit Ops Sync | AMAZON0008770 | Relevance. FRE 401. | Aside from the reference to DAB, this document describes future potential changes to FBA reconciliation and reimbursement requests. It is irrelevant to the Debtor's requests or any other issues at trial. | Moved to Trustee's list from Joint List per Amazon's request |

Attachment 2

| | | | | | | |
|----------|-----|--|---------------|--|--|--|
| 02/16/21 | 169 | Email from Patrick Gowey to Paholrat Nopsittiporn dated January 28, 2013 re DAB Unlimited | AMAZON0008771 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 170 | Email from Catia Monteiro to Diana Flores dated March 27, 2013 re DAB Unlimited (809441551) Reconciliation Cases | AMAZON0002574 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 171 | FBA "Inventory Reports" document | AMAZON0008438 | No objection. | | Moved to Trustee's list from Joint List per Amazon's request |
| 02/16/21 | 172 | Declaration of Serena Morones | N/A | Improper new and undisclosed expert testimony. FRCP 26(a)(2). Cumulative. FRE 403. | The declaration contains new and undisclosed testimony from Ms. Morones that must be excluded because it does not comply with Federal Rule of Civil Procedure 26(a)(2). It is also not a proper supplementation of Ms. Morones' testimony under Federal Rule of Civil Procedure 26(a)(2)(E). Amazon is unclear whether this is a different declaration than the one that Ms. Morones submitted to the Court on November 20, 2020, and that Amazon understands the Trustee is planning to submit as an exhibit. To the extent it is the same declaration, Amazon objects that it is unnecessarily cumulative. To the extent this declaration is a new document, Amazon reserves the right to lodge any applicable objections once it receives the document. | |
| 02/16/21 | 178 | Graph of PD's post-termination removal requests | N/A | | | |
| 02/16/21 | 179 | Graph of Inventory in M15 not shown in Seller Central | N/A | | | |
| 02/16/21 | 180 | Table of post-1/31/14 removals of inventory not shown in M15 | N/A | | | |
| 02/16/21 | 181 | Graph of post-1/31/14 removals of inventory not shown in M15 | N/A | | | |
| 02/16/21 | 182 | Table of February 2014 to March 2015 inventory transactions | N/A | | | |
| 02/16/21 | 183 | Table of aged requests in February 2014 removals | N/A | | | |

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| Admitted | No. | Amazon Exhibits | Bates/Identifier | Trustee Objection | Description of Trustee Objection | Note |
|----------|-----|--|----------------------------|---------------------|----------------------------------|------|
| 02/16/21 | 201 | 07/09/13 Complaint | DX 171 | No objection | | |
| 02/16/21 | 202 | Morones Invoices | PD008443 | No objection | | |
| 02/19/21 | 203 | 12/14/10 Reilly Email Re: Listing Errors | AMZ_DABP_00154436 / DX 188 | Relevance. FRE 401. | | |
| 02/19/21 | 204 | 1/13/11 Soder Email Re: 404 SKU's | AMZ_DABP_00155332 / DX 189 | Relevance. FRE 401. | | |
| 02/19/21 | 205 | 1/14/11 Azzarelli Email Re: Further Sku Miscreation | AMZ_DABP_00155315 / DX 110 | Relevance. FRE 401. | | |
| 02/19/21 | 206 | 1/21/11 Reilly Email Re: missing SKUs | AMZ_DABP_00155871 / DX 190 | Relevance. FRE 401. | | |
| 02/19/21 | 207 | 7/15/11 Reilly Email Re: | AMZ DABP 00152661 / DX 191 | Relevance. FRE 401. | | |
| 02/19/21 | 210 | 5/8/12 Lawcock Email Re: Case 58103781 | DX 135 | Relevance. FRE 401. | | |
| 02/19/21 | 211 | 8/14/12 Bellino Email Re: Important: Fulfillment by Amazon Defective Units | DX 145 | Relevance. FRE 401. | | |
| 02/19/21 | 212 | 8/22/12 Bellino Email Re: Your Amazon.com Inventory | DX 146 | Relevance. FRE 401. | | |
| 02/19/21 | 213 | 9/6/12 Bellino Email Re: Your Amazon.com Inventory | DX 147 | Relevance. FRE 401. | | |
| 02/19/21 | 214 | 12/10/12 Bellino Email Re: Full Audit Amazon | AMZ_DABP_00191117 / DX 179 | Relevance. FRE 401. | | |
| 02/19/21 | 215 | FBA Inventory Overview 2008, 2009, 2010, 2011 Spreadsheet PDF | AMZ_DABP_00191118 / DX 180 | Relevance. FRE 401. | | |
| 02/16/21 | 216 | 12/15/12 Shaffer Email Re: Full Amazon Audit | DX 181 | No objection | | |
| 02/19/21 | 217 | 12/20/12 Lawcock Email Re: 2012 Audit Up to December 18th Added to Case 80244611 | AMZ_DABP_00191420 / DX 165 | Relevance. FRE 401. | | |
| 02/19/21 | 218 | 1/2/13 Lawcock Email Re: DAB Update 2013 | AMZ_DABP_00007958 / DX 162 | Relevance. FRE 401. | | |
| 02/16/21 | 219 | 1/22/13 Bellino Email Re: Remittance Advice for 1/9 and 1/10 | AMZ_DABP_00175343 | No objection | | |
| 02/16/21 | 220 | 2/12/13 Meeting with Amazon Agenda and Emails | DX 154 | No objection | | |

Attachment 2

| | | | | | | |
|----------|-----|---|-----------------------------|--|--|--|
| 02/19/21 | 221 | 2/13/13 DAB Email Re: Important: Fulfillment by Amazon Defective Units | DX 137 | Relevance. FRE 401. | | |
| 02/19/21 | 222 | 3/12/13 Disclosure Statement | DX 140 | Relevance. FRE 401. | | |
| 02/19/21 | 223 | 3/13/13 Lawcock Email Re: FBA Inventory Summaries | AMZ_DABP_00190463 /DX 177 | Relevance. FRE 401. | | |
| 02/19/21 | 224 | FBA Inventory Overview 2008, 2009, 2010, 2011 Spreadsheet PDF | AMZ_DABP_00190464/ DX 178 | Relevance. FRE 401. | | |
| 02/19/21 | 226 | 4/23/13 Bellino Email Re: Revenues, Actual and Projected, Feb - Apr 2013 | AMZ DABP 00195389 / DX 130 | Relevance. FRE 401. | | |
| 02/19/21 | 227 | Revenues 2013 Spreadsheet PDF | DX 131 | Relevance. FRE 401. | | |
| 02/16/21 | 228 | 4/23/13 Azzarelli Email Re: Revenues, Actual and Projected, Feb - Apr 2013 | AMZ DABP 00195392 / DX 132 | Relevance. FRE 401. | | |
| 02/19/21 | 229 | 5/7/13 Notice of Filing Chapter 11 Trustee's Report | SHAFFER0013 / DX 6 / DX 143 | Relevance. FRE 401. | | |
| 02/19/21 | 230 | 7/9/13 Azzarelli Email Re: Aged Inventory Project Summer Clean | DX 121 | Relevance. FRE 401. | | |
| 02/16/21 | 233 | 4/14/17 Trustee Response to Amazon Second Discovery Requests | N/A | No objection | | |
| 02/19/21 | 234 | 3/13/18 Cone Retention Letter | N/A | Relevance. FRE 401. | | |
| 02/19/21 | 240 | 8/10/18 Goldberg Email Re: Monthly Operating Reports for Stay Violation Damages | Shaffer19002100 | Relevance. FRE 401. | | |
| 02/19/21 | 243 | 5/9/19 Ashworth Email Re: Settlement Report Question | PD008304 / DX 201 | Relevance. FRE 401. | | |
| 02/18/21 | 245 | Auto Unsellable Removal Setting Screenshot | N/A | Relevance. FRE 401. Foundation. FRE 602. FRE 408. Authenticity. FRE 901. | | |
| 02/17/21 | 247 | Settlement Report Txt File | AMAZON00010990 | Foundation. FRE 602. Failure to disclose. FRCP 26(a). | | |

Attachment 2


| | | | | | | |
|----------|-----|--|----------------|---|--|--|
| 02/17/21 | 248 | Settlement Report Txt File | AMAZON00010992 | Foundation. FRE 602. Failure to disclose. FRCP 26(a). | | |
| 02/17/21 | 249 | Settlement Report Txt File | AMAZON00010991 | Foundation. FRE 602. Failure to disclose. FRCP 26(a). | | |
| 02/17/21 | 250 | Settlement Report Txt File | AMAZON00010993 | Foundation. FRE 602. Failure to disclose. FRCP 26(a). | | |
| 02/17/21 | 251 | Settlement Report Txt File | AMAZON00010994 | Foundation. FRE 602. Failure to disclose. FRCP 26(a). | | |
| 02/17/21 | 252 | Settlement Report Txt File | AMAZON00010995 | No objection | | |
| 02/16/21 | 253 | Settlement Reports Screenshot Exhibit | DX 202 | Foundation. FRE 602. Failure to disclose. FRCP 26(a). | | |
| 02/16/21 | 259 | Trial Declaration of E. Weiant Williams | N/A | Objections reserved | | |
| 02/19/21 | 261 | ACQIAI Inventory Adjustment Item Document | Williams DX 20 | Foundation. FRE 602. Authenticity. FRE 901. | | |
| 02/19/21 | 262 | Declaration of Ershad Junaid | N/A | | | |
| 02/18/21 | 263 | Maximum Units Exhibit | N/A | | | |
| 02/19/21 | 264 | Revised Morones Compounding Errors Exhibit | N/A | | | |

Merchant: DAB 

Help

Seller Central Help: Fulfillment by Amazon: FBA Business Analytics: Inventory Reports: **Inventory Adjustments**

Inventory Adjustments

| Policies and Requirements | Features and Fees | Managing FBA Inventory | Business Analytics | Reports |
|---|-------------------|------------------------|--------------------|---------|
|  This report shows corrections and updates to your inventory in response to issues such as damage, loss, receiving discrepancies, inventory transfers, and so on. View the Inventory Adjustments report. | | | | |

Field Definitions

| Online Header | Download Header | Description |
|---------------------|-----------------------|---|
| Date | adjustment-date | DD-MON-YYYY |
| Transaction Item ID | transaction-item-id | Unique ID for this item adjustment |
| FNSKU | fnsku | Unique item ID used by fulfillment center |
| Merchant SKU | sku | Unique item ID used by seller |
| Title | product-name | Name of product as listed on Amazon.com |
| FC | fulfillment-center-id | Fulfillment center where adjustment is being made |
| Quantity | quantity | Units adjusted |
| Reason | reason | Download file displays codes while Online view shows descriptions. See Adjustment Reason Codes for full codes and descriptions. |
| Disposition | disposition | SELLABLE or UNSELLABLE |

Adjustment Reason Codes

The Description and Code are used in the Online and Download versions of the report respectively.

| Code | Type | Description | Code Group |
|------|------|---|--------------------------|
| 1 | + | Software correction of inventory discrepancies | Software Corrections |
| 2 | - | Software correction of inventory discrepancies | Software Corrections |
| 3 | + | Product redefinition and transfer in from original inventory item | Catalog Management |
| 4 | - | Product redefinition and transfer out to new inventory item | Catalog Management |
| 5 | - | Unrecoverable inventory | Unrecoverable Inventory |
| 6 | - | Damaged by inbound carrier | Damaged Inventory |
| D | - | Destroyed | Unrecoverable Inventory |
| E | - | Damaged at Amazon fulfillment center | Damaged Inventory |
| F | + | Inventory found | Misplaced and Found |
| H | - | Damaged &C" customer return | Damaged Inventory |
| J | + | Software correction of inventory discrepancies | Software Corrections |
| K | - | Damaged as result of item defect | Damaged Inventory |
| M | - | Inventory misplaced | Misplaced and Found |
| N | + | Receipt from another owner | Transferring Ownership |
| O | - | Transfer to another owner | Transferring Ownership |
| P | + | Unsellable inventory | Damaged Inventory |
| Q | - | Damaged &C" miscellaneous | Damaged Inventory |
| U | - | Damaged by merchant | Damaged Inventory |
| X | - | Correction for inbound shipment receiving discrepancies | Inbound Shipment Receive |

Yes

No

- Inventory Reconciliation Report
- Amazon Fulfilled Inventory
- Daily Inventory
- Monthly Inventory
- Received Inventory
- Inventory Event Detail
- Inventory Adjustments**
- Inventory Health Report
- Manage FBA Inventory
- Manage FBA Inventory - Archived
- Cross-Border Inventory Movement
- Inbound Performance
- Hazmat Status Change Report
- Inventory Shipment Report

Visit our Seller Forums to get help from other sellers:

[Ask your question](#)

Or get help from Amazon:

[Contact Seller Support](#)

EXHIBIT 7

WIT: BashamDATE: 3/26/19

Judy Bonicelli, RPR, CCR 2322

EXHIBIT: 3

DATE: 7-26-17

Patsy Jacoy, RPR, CCR

CONFIDENTIAL

AMAZON0008429

| | | | | |
|--|--|--|--|-------------|
| | | | | Adjustments |
|--|--|--|--|-------------|

Misplaced and Found

If you have large volumes of inventory, we recommend downloading the report so you can sort and filter the adjustments to match Misplaced inventory with Found inventory.

| Code | Description |
|------|---|
| F | The item was found in a bin location in the fulfillment center. Amazon's inventory management software has no record that the item was placed in the location it was found. |
| M | The inventory is missing from the bin location in the fulfillment center. Amazon's inventory management software has a record of this item assigned to this location but the location is empty. |

Damaged Inventory

When inventory is found damaged, an adjustment is made from (-) your sellable inventory (using code 6, E, H, K, Q or U) to (+) your unsellable inventory (code P).

| Code | Description |
|------|---|
| P | An Increase of your unsellable inventory. |
| 6 | A decrease of your sellable inventory due to damage for which the inbound carrier is responsible. |
| E | A decrease of your sellable inventory due to damage for which the Amazon fulfillment center is responsible. |
| H | A decrease of your sellable inventory due to damage discovered upon return from a customer. |
| K | A decrease of your sellable inventory when the item was found to be defective. |
| Q | A decrease of your sellable inventory when damage cannot be attributed to a source. |
| U | A decrease of your sellable inventory due to damage for which you are responsible. |

You will see two line entries per inventory item when changing from one condition to another.

Example

| Date | Transaction Item ID | Fulfillment Network SKU | Merchant SKU | Title | Fulfillment Center | Quantity | Reason | Disposition |
|----------------|---------------------|-------------------------|--------------|--------------------------|--------------------|----------|--|-------------|
| March 24, 2009 | 13895071006 | X0000COYXD | 2Y-IQFY-RUQV | How Deep Lies the Shadow | LEJ1 | -1 | Q - Damaged at Amazon Fulfillment Center | SELLABLE |
| March 24, 2009 | 13895071060 | X0000COYXD | 2Y-IQFY-RUQV | How Deep Lies the Shadow | LEJ1 | 1 | P - Unsellable inventory | UNSELLABLE |

Note: The original condition (SELLABLE) of the item is listed on the line with reason code Q. Code P shows the new condition (UNSELLABLE).

Unrecoverable Inventory

| Code | Description |
|------|--|
| 5, D | Inventory is lost or so badly damaged it cannot be processed for vendor return or liquidation. |

Inbound Shipment Receive Adjustments

| Code | Description |
|------|--|
| X | An adjustment of quantity made while receiving an inbound shipment. These are most commonly made when an Amazon associate miscounts or scans the wrong barcode and later corrects the discrepancy. |

Software Corrections

| Code | Description |
|---------|--|
| 1, 2, J | A software correction of inventory tracking discrepancies. |

Transferring ownership

These codes are most often used when one merchant sells inventory to another merchant.

| Code | Description |
|------|---|
| N | Units are added to your inventory and removed from another owner's inventory. |
| O | Units are removed from your inventory and added to another owner's inventory. Note: If you are reimbursed for inventory damaged in the fulfillment center, the damaged inventory will be transferred to Amazon using this reason code. |

Catalog Management

These codes generally occur when two products with separate identifiers are determined to be the same. One product will be removed from inventory and added as another product.

| Code | Description |
|------|--|
| 3 | Units were added to your inventory following the removal from another product listing. Follows a code 4 adjustment. |
| 4 | Units were removed from your inventory and will be added back to your inventory as another product listing. Occurs prior to a code 3 adjustment. |

[Rate this page](#) | [Contact Seller Support](#)

DAE Unlabeled

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AMAZON0008431

Attachment 3

amazon seller central

English ▼

Search

Q

Messages | Help | Settings

DAB Unlimited

www.amazon.com ▼

CATALOG NEW

INVENTORY

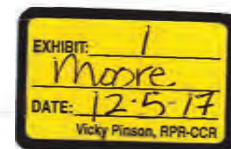
ORDERS

ADVERTISING

STORE

Now you can change to any available marketplace using this drop-down menu

PERFORMANCE



Help

Seller Central Help: [Fulfillment by Amazon \(FBA\)](#): [FBA business reports](#): [Inventory Reports](#): **Inventory Adjustments**

Inventory Adjustments

The [Inventory Adjustments](#) report shows the history of adjustments to your inventory in response to issues such as damage, loss, receiving discrepancies, and inventory transfers.

Field definitions

| Online Header | Download Header | Description |
|-----------------------|-----------------------|--|
| Date | adjustment-date | DD-MM-YYYY |
| Transaction Item ID | transaction-item-id | Unique ID for this item adjustment |
| FNSKU | fnsku | Unique item ID assigned by Amazon, used by the fulfillment center |
| Merchant SKU | sku | Unique item ID assigned by the seller |
| Title | product-name | Name of product as listed on Amazon |
| Fulfillment Center ID | fulfillment-center-id | Fulfillment center where the adjustment is being made |
| Quantity | quantity | Amount of units adjusted |
| Reason | reason | Download file displays codes while the online view shows descriptions. See Adjustment reason codes for full codes and descriptions. |
| Disposition | disposition | Whether the item is in sellable or unsellable/unfulfillable condition |

Adjustment reason codes

The Description and Code are used in the online and downloadable versions of the report, respectively.

Case 2:13-ap-00799-DPC Doc 267-14 Filed 11/20/20 Entered 11/20/20 16:18:46
Desc Exhibit 14 Page 2 of 5

Was this article helpful?

- ☐ Yes
☐ No

Related Topics

- ♦ Stranded inventory
- ♦ Reserved Inventory
- ♦ Inventory Reconciliation Report
- ♦ Amazon Fulfilled Inventory
- ♦ Daily Inventory
- ♦ Monthly Inventory
- ♦ Received Inventory
- ♦ Inventory Event Detail
- ♦ **Inventory Adjustments**
- ♦ Inventory Health Report
- ♦ Manage FBA Inventory Report
- ♦ Manage FBA Inventory Report - Archive
- ♦ Cross-Border Inventory Movement
- ♦ Inbound Performance

More ways to get help

Visit the Seller Forums to get help from other sellers:

Ask other sellers

Or get help from Amazon:

Contact Seller Support

Attachment 3

| Code | Type | Description | Code Group |
|----------|------|---|---|
| 1 | + | Software correction of inventory discrepancies | Software corrections |
| 2 | - | Software correction of inventory discrepancies | Software corrections |
| 3 | + | Product redefinition and transfer in from original inventory item | Catalog management |
| 4 | - | Product redefinition and transfer out to new inventory item | Catalog management |
| 5 | - | Unrecoverable inventory | Unrecoverable inventory |
| 6 | - | Damaged by inbound carrier | Damaged inventory |
| D | - | Destroyed | Unrecoverable inventory |
| E | - | Damaged at Amazon fulfillment center | Damaged inventory |
| F | + | Inventory found | Misplaced and found |
| H | - | Damaged – customer return | Damaged inventory |
| J | + | Software correction of inventory discrepancies | Software corrections |
| K | - | Damaged as result of item defect | Damaged inventory |
| M | - | Inventory misplaced | Misplaced and found |
| N | + | Transfer from holding account | Transferring ownership |
| O | - | Transfer to holding account | Transferring ownership |
| P | + | Unsellable/unfulfillable inventory | Damaged inventory |
| Q | - | Damaged – miscellaneous | Damaged inventory |
| U | - | Damaged by merchant | Damaged inventory |
| X | - | Correction for inbound shipment receiving discrepancies | Inbound shipment receive adjustments |

Misplaced and Found inventory

If you have large volumes of inventory, we recommend downloading the report so you can sort and filter the adjustments to match Misplaced inventory with Found inventory.

| Code | Description |
|----------|---|
| F | The item was found in a bin location in the fulfillment center. Amazon's inventory management software has no record that the item was placed in the location it was found. |

Case 2:13-ap-00799-DPC Doc 267-14 Filed 11/20/20 Entered 11/20/20 16:18:46
Desc Exhibit 14 Page 3 of 5

TRUSTED F-1 117 0000

Attachment 3

| Code | Description |
|----------|---|
| M | The inventory is missing from the bin location in the fulfillment center. Amazon's inventory management software has a record of this item assigned to this location but the location is empty. |

Damaged inventory

When inventory is found damaged, an adjustment is made from (-) your sellable inventory (using code 6, E, H, K, Q or U) to (+) your unsellable/unfulfillable inventory (code P).

| Code | Description |
|----------|---|
| P | An increase of your unsellable/unfulfillable inventory. |
| 6 | A decrease of your sellable inventory due to damage for which the inbound carrier is responsible. |
| E | A decrease of your sellable inventory due to damage for which the Amazon fulfillment center is responsible. |
| H | A decrease of your sellable inventory due to damage discovered upon return from a customer. |
| K | A decrease of your sellable inventory when the item was found to be defective. |
| Q | A decrease of your sellable inventory when damage cannot be attributed to a source. |
| U | A decrease of your sellable inventory due to damage for which you are responsible. |

You will see two line entries per inventory item when changing from one condition to another.

| Date | Transaction_ Item_ID | Fulfillment Network SKU | Merchant SKU | Title | Fulfillment Center | Quantity | Reason | Disposition |
|----------------|----------------------|-------------------------|--------------|--------------------------|--------------------|----------|--|-------------|
| March 24, 2009 | 13895071006 | X0000COYXD | 2Y-IQFY-RUQV | How Deep Lies the Shadow | LEJ1 | -1 | Q - Damaged at Amazon Fulfillment Center | SELLABLE |
| March 24, 2009 | 13895071060 | X0000COYXD | 2Y-IQFY-RUQV | How Deep Lies the Shadow | LEJ1 | 1 | P - Unsellable/unfulfillable inventory | UNSELLABLE |

Note: The original condition (SELLABLE) of the item is listed on the line with reason code Q. Code P shows the new condition (UNSELLABLE).

Unrecoverable inventory

| Code | Description |
|-------------|--|
| 5, D | Inventory is lost or so badly damaged it cannot be processed for vendor return or liquidation. |

Case 2:13-ap-00799-DPC Doc 267-14 Filed 11/20/20 Entered 11/20/20 16:18:46 Desc Exhibit 14 Page 4 of 5

TRUSTED FILE 11/20/20

Attachment 3

Inbound shipment received adjustments

| Code | Description |
|------|--|
| X | An adjustment of quantity made while receiving an inbound shipment. These are most commonly made when an Amazon associate miscounts or scans the wrong barcode and later corrects the discrepancy. |

Software corrections

| Code | Description |
|---------|--|
| 1, 2, J | A software correction of inventory tracking discrepancies. |

Transferring ownership

These codes are most often used when we move your units in or out of a holding account. When you are reimbursed for a lost unit, if that unit is found, Amazon places it in a holding account instead of reversing the reimbursement. When you have another mis-received or lost unit, Amazon will then take the unit from the holding account and add it to your inventory. **The holding account only contains units with the same FNSKU.**

| Code | Description |
|------|--|
| N | Units are transferred to your inventory from a holding account that contains your previously lost inventory for which you have already been reimbursed. |
| O | Units are transferred from your inventory to a holding account. If you are reimbursed for a unit lost in the fulfillment center, when the unit is found, it must first be received into your inventory before it can be transferred into the holding account. Note: If you are reimbursed for inventory damaged in the fulfillment center, the damaged inventory will be transferred to Amazon using this reason code. |

Catalog management

These codes generally occur when two products with separate identifiers are determined to be the same. One product will be removed from inventory and added as another product.

| Code | Description |
|------|--|
| 3 | Units were added to your inventory following the removal from another product listing. Follows a code 4 adjustment. |
| 4 | Units were removed from your inventory and will be added back to your inventory as another product listing. Occurs prior to a code 3 adjustment. |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|-------------------|-----------------------------|---|---------------------|
| Tom Azzarelli | 10:23-11:22 | No objection | Admitted |
| | 13:1-14:8 | No objection | Admitted |
| | 25:16-26:9 | No objection | Admitted |
| | 74:16-82:24 | (For 76:3-81:3) Hearsay, FRE 801, 802; (for 80:8-81:3) Hearsay, FRE 801, 802 | Admitted |
| Tasha Bachand | 5:13-6:14 | No objection | Admitted |
| | 7:11-15:12 | (For 13:18-14:2) Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 25:1-3 | No objection | Admitted |
| | 25:18-27:17 | No objection | Admitted |
| | 30:24-38:23 | No objection | Admitted |
| | 101:10-108:19 | No objection | Admitted |
| | 113:15-117:14 | No objection | Admitted |
| | 118:10-122:7 | No objection | Admitted |
| | 130:13-132:17 | No objection | Admitted |
| | 132:18-133:11 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 133:17-140:8 | No objection | Admitted |
| | 141:25-142:14 | No objection | Admitted |
| | 144:19-149:15 | No objection | Admitted |
| | 149:20-153:3 | No objection | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|-------------------|-----------------------------|--|---------------------|
| | 153:16-154:21 | No objection | Admitted |
| | 169:18-170:23 | No objection | Admitted |
| | 172:5-174:3 | No objection | Admitted |
| | 175:17-178:22 | No objection | Admitted |
| Justin Ice | 14:9-21 | No objection | Admitted |
| | 16:19-20:14 | No objection | Admitted |
| | 22:13-20 | No objection | Admitted |
| | 23:23-25:2 | No objection | Admitted |
| | 27:7-28:4 | No objection | Admitted |
| | 31:14-18 | No objection | Admitted |
| | 39:18-40:11 | No objection | Admitted |
| | 47:9-18 | No objection | Admitted |
| | 49:11-50:22 | No objection | Admitted |
| | 59:15-60:16 | No objection | Admitted |
| | 64:15-66:17 | No objection | Admitted |
| | 69:7-8 | No objection | Admitted |
| | 69:9-70:1 | No objection | Admitted |
| | 72:13-74:16 | No objection | Admitted |
| | 74:17-25 | No objection | Admitted |
| | 75:1-76:18 | No objection | Admitted |
| | 87:1-89:16 | No objection | Admitted |
| | 95:11-14 | No objection | Admitted |
| | 99:23-100:25 | No objection | Admitted |
| | 102:24-103:15 | No objection | Admitted |
| | 103:16-104:4 | No objection | Admitted |
| | 104:5-22 | No objection | Admitted |
| | 104:23-25 | No objection | Admitted |
| | 105:1-9 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 105:10-106:8 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 107:13-108:20 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 109:15-22 | No objection | Admitted |
| | 109:23-117:10 | Joint Designation | Admitted |
| | 117:11-19 | No objection | Admitted |
| | 117:20-118:14 | No objection | Admitted |
| | 123:12-128:9 | No objection | Admitted |
| | 128:24-129:18 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|--------------|----------------------|--|--------------|
| | 133:5-138:19 | No objection | Admitted |
| | 140:22-142:15 | No objection | Admitted |
| | 150:12-151:23 | No objection | Admitted |
| | 154:13-156:16 | No objection | Admitted |
| | 156:22-157:25 | No objection | Admitted |
| | 159:20-23 | No objection | Admitted |
| | 169:7-171:5 | No objection | Admitted |
| | 172:13-173:8 | No objection | Admitted |
| | 173:18-20 | No objection | Admitted |
| | 178:7-14 | No objection | Admitted |
| | 179:21-180:13 | No objection | Admitted |
| | 183:25-185:16 | Joint Designation | Admitted |
| | 185:17-187:4 | No objection | Admitted |
| | 187:24-189:7 | No objection | Admitted |
| | 190:1-6 | No objection | Admitted |
| | 200:12-201:11 | Relevance, FRE 401, 402; Lacks personal knowledge, FRE 602 | Admitted |
| | 211:24-212:25 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 218:25-229:7 | No objection | Admitted |
| | 235:9-236:7 | Joint Designation for 235:9-13 and 235:17-236:7; no objection for 235:14-16 | Admitted |
| | 237:11-239:8 | No objection | Admitted |
| | 239:9-23 | Joint Designation | Admitted |
| | 239:24-243:4 | No objection | Admitted |
| | 243:15-244:3 | Joint Designation | Admitted |
| | 244:4-18 | No objection | Admitted |
| | 245:13-247:3 | No objection | Admitted |
| | 249:8-250:25 | No objection | Admitted |
| | 250:1-24 | No objection | Admitted |
| | 253:10-255:15 | No objection | Admitted |
| | 255:16-257:2 | No objection | Admitted |
| | 262:9-263:11 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 270:9-274:15 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| Sean Lawcock | 4:24-5:4 | No objection | Admitted |
| | 18:22-19:23 | No objection | Admitted |
| | 20:15-22:3 | No objection | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|------------|----------------------|---|--------------|
| | 24:16-25:9 | No objection | Admitted |
| | 27:9-14 | No objection | Admitted |
| | 59:2-19 | No objection | Admitted |
| | 60:1-14 | No objection | Admitted |
| | 63:11-24 | No objection | Admitted |
| | 94:5-20 | No objection | Admitted |
| | 95:18-96:11 | No objection | Admitted |
| | 97:13-25 | No objection | Admitted |
| | 98:20-99:17 | No objection | Admitted |
| | 100:13-101:14 | No objection | Admitted |
| | 101:23-102:8 | No objection | Admitted |
| | 102:11-104:14 | No objection | Admitted |
| | 105:1-106:25 | No objection | Admitted |
| | 108:2-109:22 | No objection | Admitted |
| | 110:18-111:10 | No objection | Admitted |
| | 135:8-25 | No objection | Admitted |
| | 137:8-17 | No objection | Admitted |
| | 197:3-6 | No objection | Admitted |
| | 198:1-6 | No objection | Admitted |
| | 200:3-17 | No objection | Admitted |
| | 215:9-22 | No objection | Admitted |
| | 227:6-235:13 | No objection | Admitted |
| | 241:17-243:17 | No objection | Admitted |
| Jeff Moore | 5:7-18:18 | No objection | Admitted |
| | 24:9-34:9 | Joint designation for 27:7-28:5, 29:5-15, and 33:15-34:9; no objection for 24:9-27:6, 28:6-29:4, or 29:16-33:13 | Admitted |
| | 38:9-42:22 | Joint Designation for 38:9-42:3; no objection for 42:4-22 | Admitted |
| | 44:16-46:14 | Joint Designation for 46:6-14; no objection for 44:16-46:5 | Admitted |
| | 47:12-49:25 | Joint Designation for 49:16-25; no objection for 47:12-49:15 | Admitted |
| | 50:8-51:20 | No objection | Admitted |
| | 54:11-58:04 | Joint Designation for 54:11-56:3; no objection for 56:4-58:04 | Admitted |
| | 58:24-59:4 | No objection | Admitted |
| | 60:1-6 | No objection | Admitted |
| | 61:14-15 | No objection | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|----------------|----------------------|---|--------------|
| | 62:1-63:19 | No objection | Admitted |
| | 64:1-67:1 | Relevance, FRE 401, 402; MIL, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 67:24-78:1 | No objection | Admitted |
| | 84:11-87:15 | Joint Designation for 85:9-87:15; no objection for 84:11-85:8 | Admitted |
| | 94:14-97:4 | Joint Designation for 94:14-96:12; no objection for 96:13-97:4 | Admitted |
| | 98:15-102:1 | No objection | Admitted |
| | 109:16-110:14 | Joint Designation for 109:16-110:9; no objection for 110:10-14 | Admitted |
| | 114:15-123:5 | Relevance, FRE 401, 402; MILK, relates to Trustee's unpleaded and untimely claims | Admitted |
| | 127:20-128:11 | No objection | Admitted |
| | 129:25-130:12 | Joint Designation | Admitted |
| | 132:18-133:11 | No objection | Admitted |
| | 137:7-13 | No objection | Admitted |
| | 141:10-24 | No objection | Admitted |
| | 143:23-144:7 | No objection | Admitted |
| | 149:1-21 | No objection | Admitted |
| | 150:13-23 | No objection | Admitted |
| | 157:5-158:1 | Joint Designation | Admitted |
| | 158:19-159:3 | No objection | Admitted |
| | 161:17-162:5 | No objection | Admitted |
| | 165:10-166:9 | No objection | Admitted |
| | 166:16-167:8 | Joint Designation | Admitted |
| | 182:24-186:5 | No objection | Admitted |
| Daniel Bellino | 36:3-18 | No objection | Admitted |
| | 37:7-13 | No objection | Admitted |
| | 42:14-18 | No objection | Admitted |
| | 49:18-22 | No objection | Admitted |
| | 73:6-9 | No objection | Admitted |
| | 82:1-3 | No objection | Admitted |
| | 82:16-83:1 | No objection | Admitted |
| | 90:24-91:10 | No objection | Admitted |
| | 92:14-18 | No objection | Admitted |
| | 101:2-4 | No objection | Admitted |
| | 105:8-10 | No objection | Admitted |
| | 106:2-6 | No objection | Admitted |
| | 109:14-23 | No objection | Admitted |
| | 111:25-112:1 | No objection | Admitted |
| | 112:4-9 | No objection | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|-------------------|-----------------------------|--|---------------------|
| | 112:15-22 | No objection | Admitted |
| | 115:7-16 | No objection | Admitted |
| | 124:24-125:9 | No objection | Admitted |
| | 154:21-24 | No objection | Admitted |
| | 155:25-156:1-14 | No objection | Admitted |
| | 159:7 | No objection | Admitted |
| | 168:11-15 | No objection | Admitted |
| | 172:1-4 | No objection | Admitted |
| | 180:16-23 | No objection | Admitted |
| | 181:23-182:4 | No objection | Admitted |
| | 203:22-24 | No objection | Admitted |
| | 204:14-17 | No objection | Admitted |
| | 217:13-14 | No objection | Admitted |
| | 221:22-23 | No objection | Admitted |
| | 242:8-17 | No objection | Admitted |
| | 243:17-244:1 | No objection | Admitted |
| | 271:1-6 | No objection | Admitted |
| | 298:5-15 | No objection | Admitted |
| | 310:12-24 | No objection | Admitted |
| | 330:15 | No objection | Admitted |
| | 330:20-333:20 | Leading, FRE 611; The designation also selectively omits opposing counsel's objections | Not Admitted |
| | 334:20-335:2 | Lacks personal knowledge/Foundation, FRE 602; Leading, FRE 611 | Admitted |
| Stephen Ashworth | 22:8-12 | Joint Designation | Admitted |
| | 27:1-28:9 | Joint Designation | Admitted |
| | 29:24-30:24 | Joint Designation for 29:24-30:17; no objection for 30:18-24 | Admitted |
| | 32:1-18 | Joint Designation | Admitted |
| | 35:15-36:23 | Joint Designation for 35:15-20 and 35:23-36:20; no objection to 35:21 or 36:21-23 | Admitted |
| | 38:21-39:8 | Joint Designation | Admitted |
| | 40:16-41:1 | Joint Designation | Admitted |
| | 41:5-12 | Joint Designation | Admitted |
| | 43:13-24 | Joint Designation | Admitted |
| | 45:6-21 | Joint Designation | Admitted |
| | 49:3-51:25 | Joint Designation for 49:3-50:7; no objection to 50:8-51:25 | Admitted |
| | 52:22-54:5 | Joint Designation for 52:22-53:8 and 53:11-19; no objection to 53:9-10 or 53:20-54:5 | Admitted |
| | 54:15-56:24 | Joint Designation | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|------------|----------------------|---|--------------|
| | 61:10-66:5 | Joint Designation for 61:10-15, 62:4-63:23, and 66:1-5; no objection to 61:16-62:3 or 63:24-65:25 | Admitted |
| | 73:18-74:20 | Joint Designation | Admitted |
| | 77:11-81:9 | Joint Designation for 77:11-80:20; no objection to 80:21-81:9 | Admitted |
| | 84:4-93:4 | Joint Designation for 84:4-86:21, 87:16-90:17, 90:21-93:4; no objection for 86:22-87:15, 90:18-20 | Admitted |
| | 104:14-107:2 | No objection | Admitted |
| | 116:9-18 | No objection | Admitted |
| | 117:13-119:15 | No objection | Admitted |
| | 120:5-122:5 | No objection | Admitted |
| | 123:22-124:4 | No objection | Admitted |
| Soder | 11:1-13 | Relevance, FRE 401, 402 | |
| | 15:2-4 | No objection | Admitted |
| | 16:11-19; 23-24 | No objection | Admitted |
| | 19:2-8 | No objection | Admitted |
| | 22:8-12 | No evidentiary objection, but the designation begins in the middle of an answer. | Admitted |
| | 23:11-24:4 | No objection | Admitted |
| | 53:15-54:20 | No objection | Admitted |
| | 56:2-11 | No objection | Admitted |
| | 58:3-59:5 | No objection | Admitted |
| | 63:13-64:15 | No objection | Admitted |
| | 64:22-65:5 | No objection | Admitted |
| | 74:14-75:3 | No objection | Admitted |
| | 85:22-86:4 | No objection | Admitted |
| | 88:5-17 | No objection | Admitted |
| | 140:6-11 | No objection | Admitted |
| | 7:19-7:25 | Joint Designation | Admitted |
| Cone | 8:9-10 | Joint Designation | Admitted |
| | 27:9-13 | No objection | Admitted |
| | 28:16-24 | No objection | Admitted |
| | 30:12-31:3 | No objection | Admitted |
| | 31:10-19 | No objection | Admitted |
| | 35:2-16 | No objection | Admitted |
| | 39:2-40:6 | No objection | Admitted |
| | 43:7-22 | No objection | Admitted |
| | 46:5-47:12 | No objection | Admitted |
| | 48:10-49:1 | No objection | Admitted |
| | 51:5-18 | No objection | Admitted |

Attachment 4

| Deposition | Trustee Designations | Amazon Position/Objection | Court Ruling |
|-------------------|-----------------------------|----------------------------------|---------------------|
| | 72:2-73:7 | No objection | Admitted |
| | 87:17-88:11 | No objection | Admitted |
| | 96:17-18 | No objection | Admitted |
| | 100:12-102:10 | No objection | Admitted |
| | 122:23-123:16 | No objection | Admitted |
| | 124:14-126:12 | No objection | Admitted |
| | 129:15-23 | No objection | Admitted |
| | 130:6-132:19 | No objection | Admitted |
| | 187:7-13 | No objection | Admitted |

Attachment 5

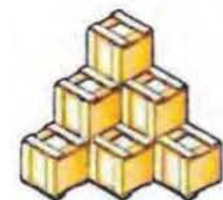


EXHIBIT 3
 WIT: Baichant
 DATE: 7/26/19
 Judy Bonicelli, RPR, CCR 2322

EXHIBIT 3
Ice
 DATE: 7-26-17
 Patsy Jacoy RPR, CCR

Attachment 6

| Deposition | Amazon Designations | Trustee's Objection | Court Ruling |
|-------------------|----------------------------|--|---------------------|
| Daniel A. Bellino | | In addition to those objections stated on the record during the deposition, the Trustee objects to the | |
| | 7:21-8:2 | No Objection | Admitted |
| | 14:8-14:25 | No Objection | Admitted |
| | 15:1-15:23 | No Objection | Admitted |
| | 15:24-17:9 | No Objection | Admitted |
| | 17:15-18:17 | No Objection | Admitted |
| | 18:13-20:12 | No Objection | Admitted |
| | 22:6-22:23 | No Objection | Admitted |
| | 23:5-24:15 | No Objection | Admitted |
| | 26:15-28:9 | No Objection | Admitted |
| | 29:24-30:17 | No Objection | Admitted |
| | 31:20-35:9 | No Objection | Admitted |
| | 35:15-35:20 | No Objection | Admitted |
| | 35:23-36:20 | No Objection | Admitted |
| | 37:1-38:1 | No Objection | Admitted |
| | 38:21-39:8 | No Objection | Admitted |
| | 40:16-41:1 | No Objection | Admitted |
| | 41:5-41:12 | No Objection | Admitted |
| | 43:13-43:24 | No Objection | Admitted |
| | 45:6-45:21 | No Objection | Admitted |
| | 49:3-50:7 | No Objection | Admitted |
| | 52:22-53:8 | No Objection | Admitted |
| | 53:11-53:19 | No Objection | Admitted |
| | 54:15-56:24 | No Objection | Admitted |
| | 61:10-61:15 | No Objection | Admitted |
| | 62:4-63:11 | No Objection | Admitted |
| | 63:12-63:23 | No Objection | Admitted |
| | 66:1-66:5 | No Objection | Admitted |

Attachment 6

| | | |
|--------------|---|----------|
| 73:18-74:20 | No Objection | Admitted |
| 77:11-80:20 | No Objection | Admitted |
| 84:4-84:21 | No Objection | Admitted |
| 84:23-86:21 | No Objection | Admitted |
| 87:16-90:17 | No Objection | Admitted |
| 90:21-93:4 | No Objection | Admitted |
| 93:24-104:13 | Fed. R. Evid. 401, Privilege, FRCP 26(b)(4)(B)-(C). | Admitted |
| 108:17-109:4 | Fed. R. Evid. 401 | Admitted |
| 110:2-110:15 | Fed. R. Evid. 401 | Admitted |
| 111:8-111:25 | Fed. R. Evid. 401 | Admitted |
| 7:8-7:10 | In addition to those objections stated on the record during the deposition, the Trustee objects to Amazon's designated testimony as follows: Trustee objects to any designation of Mr. Bellino's testimony under Fed. R. Evid. 401, 403, and 608. | Admitted |
| 7:20-8:8 | | Admitted |
| 9:17-10:4 | | Admitted |
| 15:5-15:8 | | Admitted |
| 15:18-16:14 | | Admitted |
| 17:10-19:9 | | Admitted |
| 19:15-20:7 | | Admitted |
| 20:13-23:19 | | Admitted |
| 25:20-30:10 | | Admitted |
| 31:23-33:22 | | Admitted |
| 34:2-35:22 | | Admitted |
| 36:25-37:6 | | Admitted |
| 37:17-40:25 | | Admitted |
| 41:2-41:25 | | Admitted |
| 42:20-48:14 | | Admitted |
| 51:3-51:4 | | Admitted |
| 51:10-51:13 | | Admitted |
| 53:3-53:25 | | Admitted |
| 64:10-67:17 | | Admitted |
| 68:3-76:3 | | Admitted |
| 76:15-76:23 | | Admitted |
| 77:12-79:4 | | Admitted |
| 80:20-81:17 | | Admitted |
| 83:21-84:9 | | Admitted |
| 85:11-85:14 | | Admitted |

Attachment 6

| |
|---------------|
| 85:23-90:22 |
| 92:2-92:10 |
| 92:19-97:10 |
| 100:8-101:1 |
| 102:22-105:7 |
| 106:8-106:21 |
| 108:3-109:11 |
| 109:24-112:3 |
| 112:23-115:5 |
| 115:21-116:5 |
| 117:24-118:12 |
| 121:20-122:25 |
| 123:16-123:19 |
| 124:18-124:23 |
| 126:2-126:19 |
| 127:9-127:18 |
| 131:23-133:22 |
| 135:3-135:25 |
| 136:11-137:12 |
| 138:6-138:20 |
| 139:15-140:12 |
| 144:9-146:10 |
| 147:7-149:3 |
| 149:24-150:5 |
| 150:11-153:5 |
| 153:9-155:24 |
| 156:15-157:21 |
| 158:1-159:24 |
| 160:17-161:13 |
| 161:14-162:22 |
| 166:5-170:1 |
| 170:2-176:17 |
| 180:9-180:15 |
| 180:25-184:17 |
| 185:7-201:20 |
| 202:6-203:3 |
| 203:5-204:10 |
| 206:22-207:3 |
| 209:14-211:22 |
| 212:19-213:10 |
| 214:3-214:10 |
| 216:10-218:23 |
| 220:3-221:20 |
| 222:3-222:14 |

[illegible]

Attachment 6

224:10-224:25

Admitted

225:9-227:23

Admitted

230:24-232:7

Admitted

233:8-236:2

Admitted

237:13-240:14

Admitted

240:16-242:7

Admitted

244:2-245:16

Admitted

247:4-249:10

Admitted

249:23-250:9

Admitted

250:14-254:4

Admitted

254:5-256:24

Admitted

258:7-261:5

Admitted

261:10-265:12

Admitted

265:14-270:3

Admitted

271:7-272:2

Admitted

273:4-273:6

Admitted

273:25-276:15

Admitted

278:22-281:13

Admitted

292:23-293:21

Admitted

296:17-297:7

Admitted

305:10-305:13

Admitted

306:17-312:24

Admitted

315:1-315:9

Admitted

315:20-317:18

Admitted

318:11-320:20

Admitted

321:2-321:8

Admitted

321:16-321:21

Admitted

322:21-324:17

Admitted

325:3-325:17

Admitted

328:4-329:8

Admitted

329:25-330:15

Admitted

Jeffrey Cone

In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows:

7:19-7:25

Joint

Admitted

8:9-8:10

Joint

Admitted

26:21-26:25

No Objection

Admitted

27:1-27:8

No objection

Admitted

27:14-28:15

No objection

Admitted

29:5-30:11

Fed R. Evid. 602

Admitted

31:6-31:7

No objection

Admitted

31:20-32:1

No objection

Admitted

34:2-35:1

Fed R. Evid. 602

Admitted

37:17-39:1

No objection.

Admitted

Attachment 6

| | | |
|---------------|---|----------|
| 40:7-43:6 | No objection. | Admitted |
| 43:23-44:18 | Fed R. Evid. 602 | Admitted |
| 45:15-46:4 | No objection. | Admitted |
| 47:13-48:1 | No objection. | Admitted |
| 49:13-50:5 | No objection. | Admitted |
| 51:19-52:9 | No objection. | Admitted |
| 54:12-66:7 | Fed. R. Evid. 401, 602 | Admitted |
| 67:4-67:9 | No objection | Admitted |
| 67:15-68:4 | No objection. | Admitted |
| 68:6-69:16 | Fed. R. Evid. 401, 602 | Admitted |
| 70:11-71:24 | Fed. R. Evid. 602 | Admitted |
| 73:8-77:10 | No objection. | Admitted |
| 79:12-86:20 | No objection. | Admitted |
| 88:12-90:23 | Fed. R. Evid. 401, 602 | Admitted |
| 90:25-92:25 | No objection | Admitted |
| 93:1-96:16 | No objection | Admitted |
| 96:19-97:19 | Fed. R. Evid. 401. Privilege. FRCP 26(b)(4)(B)-(C). | Admitted |
| 98:14-101:20 | Fed. R. Evid. 401. Privilege. FRCP 26(b)(4)(B)-(C). | Admitted |
| 105:9-106:14 | Fed. R. Evid. 401, 602 | Admitted |
| 107:1-107:12 | No objection | Admitted |
| 107:22-112:6 | Fed. R. Evid. 401, 602 | Admitted |
| 112:20-114:4 | Fed. R. Evid. 401 | Admitted |
| 114:15-121:9 | Fed. R. Evid. 401. Privilege. FRCP 26(b)(4)(B)-(C). | Admitted |
| 121:18-122:21 | Fed. R. Evid. 602 | Admitted |
| 126:14-127:7 | Fed. R. Evid. 611 | Admitted |
| 127:14-129:14 | No objection. | Admitted |
| 129:24-130:5 | No objection. | Admitted |
| 132:21-135:11 | No objection. | Admitted |
| 143:25-144:12 | No objection. | Admitted |
| 144:24-146:2 | No objection. | Admitted |
| 151:19-154:1 | No objection. | Admitted |
| 155:3-156:2 | No objection. | Admitted |
| 157:3-159:10 | No objection. | Admitted |
| 159:11-159:18 | No objection. | Admitted |
| 168:16-172:2 | Fed. R. Evid. 401. Privilege. FRCP 26(b)(4)(B)-(C). | Admitted |
| 174:9-176:15 | Fed. R. Evid. 602, Privilege. FRCP 26(b)(4)(B)-(C). | Admitted |
| 177:9-178:4 | Fed. R. Evid. 602 | Admitted |
| 184:12-187:6 | No objection. | Admitted |
| 190:23-194:17 | No Objection. | Admitted |

Attachment 6

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|------------|---------------|---|----------|
| Justin Ice | | In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows: | |
| | 5:4-5:9 | No Objection | Admitted |
| | 13:16-14:8 | No Objection | Admitted |
| | 15:17-16:18 | No Objection | Admitted |
| | 20:15-21:7 | No Objection | Admitted |
| | 23:9-23:22 | No Objection | Admitted |
| | 25:3-27:6 | No Objection | Admitted |
| | 28:22-29:10 | No Objection | Admitted |
| | 109:23-117:10 | Joint Designation | Admitted |
| | 139:16-140:21 | No Objection | Admitted |
| | 141:10-141:13 | No Objection | Admitted |
| | 142:16-144:2 | FRE 401, 602 | Admitted |
| | 146:18-146:21 | FRE 401 | Admitted |
| | 147:21-148:23 | FRE 401, 403 | Admitted |
| | 149:23-150:11 | FRE 401, 403 | Admitted |
| | 151:24-152:25 | FRE 401, 403 | Admitted |
| | 158:2-159:7 | FRE 401, 403 | Admitted |
| | 159:20-159:25 | FRE 401, 602 | Admitted |
| | 160:1-161:11 | FRE 401, 403 | Admitted |
| | 163:2-163:5 | FRE 401, 403 | Admitted |
| | 163:11-163:17 | FRE 401, 403 | Admitted |
| | 165:18-165:22 | FRE 401, 403 | Admitted |
| | 171:6-172:12 | FRE 401, 403, 602 | Admitted |
| | 174:15-175:9 | FRE 401, 403, 602 | Admitted |
| | 180:15-180:18 | Object to exhibit as hearsay | Admitted |
| | 181:22-181:25 | Hearsay, FRE 401, 402, 801 | Admitted |
| | 182:2-182:2 | No Objection | Admitted |
| | 182:20-185:16 | 401, 403, 602 | Admitted |
| | 183:17-183:20 | FRE 401, 403 | Admitted |
| | 187:5-187:12 | FRE 401, 403, 602 | Admitted |
| | 187:20-187:23 | FRE 401, 403 | Admitted |
| | 189:8-189:25 | FRE 401, 403, 602 | Admitted |
| | 191:2-191:17 | FRE 401, 403, 602 | Admitted |
| | 193:9-194:12 | FRE 401, 403, 602 | Admitted |
| | 233:23-234:13 | Hearsay, FRE 301 | Admitted |
| | 235:9-235:13 | Joint Designation | Admitted |
| | 235:17-236:7 | Joint Designation | Admitted |
| | 239:9-239:23 | Joint Designation | Admitted |
| | 243:15-244:3 | Joint Designation | Admitted |
| | 244:19-245:12 | No Objection | Admitted |
| | 249:8-249:25 | Joint Designation | Admitted |
| | 251:6-253:9 | No Objection | Admitted |

Attachment 6

| | | | |
|--------------|---------------|---|----------|
| | 261:25-262:8 | No Objection | Admitted |
| | 265:8-265:25 | No Objection | Admitted |
| | 267:16-268:12 | No Objection | Admitted |
| Sean Lawcock | | In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows: | |
| | 4:24-5:4 | Joint | Admitted |
| | 8:9-17:21 | Trustee objects to Amazon's remaining designations of Mr. Lawcock's testimony under Fed. R. Evid. 401 and 403. | Admitted |
| | 17:18-18:21 | | Admitted |
| | 22:20-24:15 | | Admitted |
| | 57:6-59:1 | | Admitted |
| | 60:20-62:4 | | Admitted |
| | 62:12-63:10 | | Admitted |
| | 65:4-66:16 | | Admitted |
| | 68:22-69:18 | | Admitted |
| | 78:7-82:13 | | Admitted |
| | 91:8-93:23 | | Admitted |
| | 98:12-98:19 | | Admitted |
| | 107:12-108:1 | | Admitted |
| | 113:15-116:16 | | Admitted |
| | 116:25-119:10 | | Admitted |
| | 130:5-134:7 | | Admitted |
| | 137:18-138:4 | | Admitted |
| | 138:22-139:16 | | Admitted |
| | 144:24-159:7 | | Admitted |
| | 159:15-165:15 | | Admitted |
| | 165:20-176:4 | | Admitted |
| | 188:20-193:20 | | Admitted |
| | 201:1-202:9 | | Admitted |
| | 202:13-206:24 | | Admitted |
| | 207:17-215:7 | | Admitted |
| | 219:20-223:23 | | Admitted |
| | 224:5-226:23 | | Admitted |
| | 236:1-240:12 | | Admitted |
| Jeff Moore | | In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows: | |
| | 27:7-28:5 | No objection | Admitted |
| | 29:5-29:15 | No objection | Admitted |
| | 33:15-34:9 | No objection | Admitted |
| | 38:9-42:3 | No objection | Admitted |
| | 46:6-46:24 | No objection | Admitted |
| | 49:16-49:25 | No objection | Admitted |
| | 54:11-56:3 | No objection | Admitted |

Attachment 6

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| 85:9-86:3 | No objection | Admitted |
| 86:4-87:15 | No objection | Admitted |
| 94:14-96:12 | No objection | Admitted |
| 102:16-105:25 | No objection | Admitted |
| 109:16-110:9 | No objection | Admitted |
| 126:17-126:24 | Pursuant to Fed. R. Evid. 106, 126:25-127:19 should be designated as well for completeness | Admitted. Additional designations included. |
| 129:25-132:6 | No objection | Admitted |
| 134:2-135:11 | Fed. R. Evid. 602 with regard to time | Not Admitted. |
| 142:23-143:17 | Fed. R. Evid. 602 with regard to lack of knowledge | Admitted |
| 144:12-145:15 | No objection | Admitted |
| 155:20-158:1 | No objection | Admitted |
| 166:16-167:8 | No objection | Admitted |
| Thomas Reilly | In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows: | |
| | 4:3-4:6 | No Objection |
| | 8:14-15:19 | No Objection |
| | 15:20-18:21 | Fed R. Evid. 401, 403, 602 |
| | 18:22-21:24 | No Objection |
| | 25:17-28:21 | No Objection |
| | 28:22-34:12 | Fed R. Evid. 401, 403, 602. If this objection is overruled, Trustee wishes to designate 34:13-20 |
| | 36:4-37:9 | Fed R. Evid. 401, 403, 602 |
| | 38:10-40:18 | Fed R. Evid. 401, 602. If this objection is overruled, trustee wishes to designate 44:14-46:11 |
| | 46:24-49:6 | No Objection |
| | 52:10-53:7 | Fed R. Evid. 401 |
| | 55:2-56:17 | Fed R. Evid. 401, 602. |
| | 70:5-72:9 | Fed R. Evid. 401,403, 602. |
| | 86:12-92:3 | Fed R. Evid. 401, 602. |
| | 92:19-107:20 | Fed R. Evid. 401, 403, 602. |
| | 114:24-116:2 | Fed R. Evid. 401, 602. |
| | 125:10-126:7 | Fed R. Evid. 401, 602. |
| | 129:13-129:24 | Fed R. Evid. 401, 602. |
| | 131:14-132:17 | Fed R. Evid. 401, 602. |
| | 133:12-134:4 | Fed R. Evid. 401, 602. |
| | 139:13-145:22 | Fed R. Evid. 401, 602. |
| | 145:23-149:4 | Fed R. Evid. 401, 403, 602. |
| | 153:16-162:13 | Fed R. Evid. 401, 602. |
| | 162:23-174:16 | Fed R. Evid. 401, 602. |
| | 175:2-180:24 | Fed R. Evid. 401, 602. |
| | 182:2-183:2 | Fed R. Evid. 401, 602. |

Attachment 6

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| | 183:3-192:16 | Fed R. Evid. 401, 602. | Admitted |
| | 193:9-201:15 | Fed R. Evid. 401, 602. | Admitted |
| Timothy Shaffer (April 24, 2019) | | In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows: | |
| | 6:1-6:4 | No Objection | Admitted |
| | 9:14-10:21 | No Objection | Admitted |
| | 12:4-14:6 | No Objection | Admitted |
| | 16:13-16:21 | No Objection | Admitted |
| | 19:14-20:9 | No Objection | Admitted |
| | 37:2-39:10 | Fed. R. Evid. 401. | Admitted |
| | 40:5-43:24 | Fed. R. Evid. 401. | Admitted |
| | 44:24-45:7 | Fed. R. Evid. 401. | Admitted |
| | 50:22-52:2 | Fed. R. Evid. 401. | Admitted |
| | 52:3-55:17 | Fed. R. Evid. 401. | Admitted |
| | 60:8-61:25 | Fed R. Evid. 401, 803. | Admitted |
| | 63:6-64:5 | Fed R. Evid. 401, 803. | Admitted |
| | 67:7-72:19 | Fed R. Evid. 401, 803. | Admitted |
| | 73:6-78:14 | Fed R. Evid. 401, 803. | Admitted |
| | 81:4-87:3 | Fed R. Evid. 401, 803. | Admitted |
| | 87:4-92:8 | Fed R. Evid. 401, 803. | Admitted |
| | 92:24-108:15 | Fed R. Evid. 401, 803. | Admitted |
| | 110:5-112:16 | Fed R. Evid. 401, 803. | Admitted |
| | 118:5-122:6 | Fed R. Evid. 401, 803. | Admitted |
| | 124:15-136:15 | Fed R. Evid. 401, 803. | Admitted |
| | 140:20-148:20 | Fed R. Evid. 401, 803. | Admitted |
| | 148:21-150:24 | Fed R. Evid. 401, 803. | Admitted |
| | 153:9-153:14 | Fed R. Evid. 401, 803. | Admitted |
| | 154:22-167:14 | Fed R. Evid. 401, 803. | Admitted |
| | 168:9-183:20 | Fed R. Evid. 401, 803. | Admitted |
| | 184:7-194:11 | Fed R. Evid. 401, 803. | Admitted |
| | 194:25-202:3 | Fed R. Evid. 401, 803. | Admitted |
| Timothy Shaffer (July 3, 2019) | | In addition to those objections stated on the record during the deposition, the Trustee objects to the designated testimony as follows: | |
| | 5:4-5:6 | No Objection | Admitted |
| | 21:7-22:1 | Fed. R. Evid. 401, 803. | Admitted |
| | 22:14-22:19 | No Objection | Admitted |
| | 23:14-23:24 | No Objection | Admitted |
| | 44:4-46:6 | No Objection | Admitted |
| | 78:9-80:20 | No Objection | Admitted |
| | 111:7-114:19 | No Objection | Admitted |
| | 118:12-126:24 | No Objection | Admitted |
| | 127:2-131:24 | No Objection | Admitted |

Attachment 6

Eric Soder

| | | |
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| 5:1-5:6 | No Objection | Admitted |
| 14:25-15:1 | No Objection | Admitted |
| 15:18-16:7 | No Objection | Admitted |
| 17:19-18:10 | No Objection | Admitted |
| 43:15-49:11 | No Objection | Admitted |
| 49:16-51:2 | No Objection | Admitted |
| 51:23-52:15 | No Objection | Admitted |
| 52:23-53:14 | No Objection | Admitted |
| 65:6-66:23 | No Objection | Admitted |
| 68:3-70:11 | No Objection | Admitted |
| 72:23-74:13 | No Objection | Admitted |
| 77:23-78:7 | No Objection | Admitted |
| 79:5-80:12 | No Objection | Admitted |
| 85:13-85:21 | No Objection | Admitted |
| 138:16-139:18 | No Objection | Admitted |
| 144:9-146:13 | Fed. R. Evid. 401, 602 | Admitted |
| 148:7-151:5 | Fed. R. Evid. 401, 602 | Admitted |
| 152:12-153:7 | Fed R. Evid. 401, 403, 602. If this objection is overruled, Trustee wishes to designate 153:9-16 | Admitted |
| 161:13-165:6 | Fed. R. Evid. 401, 403, 602 | Admitted |

Attachment 7

Stabilized Income July 2012 to March 2012¹

| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|--|---------------------|---------------------|---------------------|---------------------|--|--|
| | Jul-12 ⁴ | Aug-12 ⁵ | Sep-12 ⁶ | Oct-12 ⁷ | Actual Average ² Nov 2012 - Mar 2013 | Actual Average ³ Jul 2012 - Mar 2013 |
| Actual/Expected Revenues | 1,329,453 | 1,476,511 | 1,431,951 | 1,260,914 | 1,591,877 | 1,495,357 |
| Less: Cost of Sales | 1,180,939 | 1,317,276 | 1,268,872 | 1,117,129 | 1,404,622 | 1,323,036 |
| Gross Total | 148,514 | 159,235 | 163,079 | 143,785 | 187,256 | 172,321 |
| Less: Outside Labor | 11,117 | 6,218 | 13,489 | 6,428 | 23,812 | 17,701 |
| Less: Outside Fulfillment ⁸ | 0 | 0 | 0 | 0 | 4,368 | 2,427 |
| Less: Outside Supplies | 6,771 | 5,687 | 3,770 | 6,051 | 4,596 | 5,029 |
| Contribution Margin | 130,626 | 147,330 | 145,820 | 131,306 | 154,480 | 147,165 |
| Contribution Margin % | | | | | 9.7% | 9.8% |

¹ A version of this chart is found at Exhibit 10 to Williams' Rebuttal Report (Ex. 5).

² See Ex. 7, Table 6A.

³ These totals reflect (Columns 2+3+4+5 ÷ 4 months) + (Column 6 x 5 months) ÷ 9 months. This column also reflects the numbers from Exhibit 10 to Williams' Rebuttal Report (Ex. 5).

⁴ DE 179.

⁵ DE 180.

⁶ DE 198.

⁷ DE 199.

⁸ Unlike Debtor's Monthly Operating Reports ("MOR's") for November 2012 through March 2013, Debtor's July 2012 through October 2012 MOR's do not contain an expense line item for "Outside Fulfillment." See Table 6 to Morones' Damages Report (Ex. 7).

Attachment 8

Stay Violation 2013

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | |
|------------------------------|---|--------------------|--------------------|--------------------|--------------------|--------------------|--------------------|----------------------|-------------------------------|
| | Actual Average ¹ Jul 2012 - Mar 2013 | Expected Losses | Expected Losses | Expected Losses | Expected Losses | Expected Losses | Expected Losses | Expected Losses | Total Damages ² |
| | | Apr-13 | May-13 | Jun-13 | Jul-13 | Aug-13 | Sep-13 | Oct-13 | |
| Actual/Expected | | | | | | | | | |
| Revenues | 1,495,357 | 1,495,357 | 1,495,357 | 1,495,357 | 1,495,357 | 1,495,357 | 1,495,357 | 1,495,357 | |
| Less: Cost of Sales | 1,323,036 | 1,323,036 | 1,323,036 | 1,323,036 | 1,323,036 | 1,323,036 | 1,323,036 | 1,323,036 | |
| Gross Total | 172,321 | 172,321 | 172,321 | 172,321 | 172,321 | 172,321 | 172,321 | 172,321 | |
| Less: Outside Labor | 17,701 | 17,701 | 17,701 | 17,701 | 17,701 | 17,701 | 17,701 | 17,701 | |
| Less: Outside Fulfillment | 2,427 | 2,427 | 2,427 | 2,427 | 2,427 | 2,427 | 2,427 | 2,427 | |
| Less: Outside Supplies | 5,029 | 5,029 | 5,029 | 5,029 | 5,029 | 5,029 | 5,029 | 5,029 | |
| Contribution Margin | 147,165 | 147,165 | 147,165 | 147,165 | 147,165 | 147,165 | 147,165 | 147,165 | |
| Contribution Margin % | 9.8% | | | | | | | | |
| Less: Actual Margin | | 99,668 | 78,989 | 50,784 | 14,783 | 134,254 | -39,016 | -28,910 | |
| Total Lost Profits | | 47,497 | 68,176 | 96,381 | 132,382 | 12,911 | 186,181 | 124,956 ³ | 668,484 |

¹ See Attachment 3. See also Ex. 5, Williams Rebuttal Report and his Exhibit 10.

² The sum of lost profits from Columns 3 through 9.

³ Pro-rated lost profits calculated \$176,075 divided by (22 days ÷ 31 days) = \$124,956